IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1714

HOWARD A. KIDDER

Petitioner

versus

BOB ANDERSON and
CAPITAL CITY PRESS, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Constitution and Statutes

Other Authorities

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INTRODUCTION

The petitioner respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of Louisiana entered on January 30, 1978, entitled *Howard A. Kidder v. Bob Anderson and Capital City Press, Inc.*

OPINIONS BELOW

The opinion of the Court of Appeal of Louisiana, First Circuit, is reported at 345 So. 2d 922 (La. App. 1977), and is reprinted in the appendix hereto at A. The Opinion of the Supreme Court of Louisiana is reported at 354 So. 2d 1306 (La. 1978), and is reprinted in the appendix hereto at B.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on January 30, 1978. A petition for rehearing was denied on March 2, 1978. (Appendix D) This petition was filed within the time allowed for the filing of such petition.

The jurisdiction of this Court is invoked under 28 *U.S.C.A.* § 1257(3) (1966).

QUESTIONS PRESENTED

1. Did the Louisiana Supreme Court misconstrue and misapply the *New York Times* actual malice rule by reversing a judgment for a public official-defamation plaintiff where there was a finding of calculated falsehood as well as reckless disregard of truth or falsity on the part of the defendants, a newspaper and its reporter, so as to deprive such plaintiff of the right to recover on proof of *New York Times* actual malice?

2. Did the Louisiana Supreme Court, by overruling the jury's verdict for the plaintiff, without finding that there was no credible evidence in support of such verdict, violate the plaintiff's rights, under the Seventh and Fourteenth Amendments, to a trial by jury, by re-examining the evidence in a manner not in accordance with the rules of the common law?

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents issues arising under the Seventh Amendment to the United States Constitution, which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law[.]

and under the Fourteenth Amendment, which provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Howard A. Kidder, hereinafter referred to as the plaintiff, is Chief of Police of the City of Baton Rouge, Louisiana. The defendant, Capital City Press, Inc. publishes two newspapers of general circulation in Baton Rouge, and defendant Bob Anderson is employed as a reporter by such newspapers. Prior to the publications forming the basis of his action, he had an outstanding reputation in the community, as evidenced in part by an editorial published on May 2, 1974, in which the defendant newspaper warmly commended the Mayor-President of Baton Rouge for appointing Kidder Acting Chief of Police.

Over a period from June 12, 1974 through August 8, 1974, the defendants published a series of articles and editorials defaming Kidder. Those publications charged Kidder with having operated a house of prostitution in the 1950's, while a member of the police force, with having accepted payoffs and gratuities in return for protection of barrooms and gambling operations, with "harrassment" of a police officer, who was one of Anderson's sources for the series of articles, and with corruption in relation to the purchase of police uniforms. There was also an article, accompanied by a misleading picture and headline, inferring impropriety with

regard to a reduced assessment on property owned by Kidder. The articles at issue are reprinted in the Appendix hereto at E.

At trial, the plaintiff produced substantial evidence going to prove both actual malice and intentional falsehood on the part of the defendants. Shortly after the appearance of the favorable editorial, a conflict developed within the Baton Rouge police department, in which a group of police officers, working through a Police Union, sought to prevent Kidder's appointment to the position of Chief of Police. Defendant Anderson joined in this effort, to the extent of promising to keep Kidder on the front page so long as the disgruntled police officers continued to provide alleged "information." The evidence shows that the defendants were aware, at time of publication, that their articles were based on mere supposition and rumor. They chose, however, to publish such rumors as substantiated facts.

Specifically, the record shows that, with regard to the two most damaging defamatory charges, *i.e.*, the barroom and gambling protection, and the operation of the house of prostitution, Anderson obtained information that Kidder was not connected with any of such activities, but chose to ignore that source of information, and rely instead on unsubstantiated rumors furnished him by the disgruntled policemen. It was shown that the defendants also relied on criminal sources, and on Kidder's brother-in-law, one Jim McBride, although he was advised by McBride that he — McBride — had had a serious brain operation, and a resulting failing memory. There was testimony that, at one meeting of the dissident policemen, Anderson expressed his agreement with their plan to get rid of Kidder.

The trial court denied the defendant's motions for partial summary judgment. After trial, the jury was instructed in accordance with the *New York Times* actual malice standard,

and returned a verdict for the plaintiff in the amount of $400,000 actual damages. The Louisiana Court of Appeal, First Circuit affirmed the judgment for the plaintiff, with dissent, but reduced the award of damages to $100,000. The Louisiana Supreme Court, with three justices dissenting, reversed the judgment for the defendants, holding that the *New York Times* line of authority would not permit recovery under the circumstances of the case. That court further held that the defendant's motion for summary judgment had been improperly denied.

The plaintiff's dual contentions that the Louisiana Supreme Court misconstrued and misapplied the *New York Times* actual malice rule, and, in so doing, and overturning the jury's verdict for the plaintiff, deprived the plaintiff of his right to a meaningful trial by jury, form the basis of this petition for certiorari.

This case was tried, from the trial stage through final appeal, on the understanding that the plaintiff was a public official, within the *New York Times* rule. Therefore, the applicable federal constitutional standard question was raised at every stage of the proceedings. The right to jury issue was raised in the application for rehearing to the Supreme Court of Louisiana, which application was denied.

REASONS FOR GRANTING THE WRIT

I. THE LOUISIANA SUPREME COURT, BASING ITS HOLDING SOLELY UPON FEDERAL CONSTITUTIONAL LAW, MISCONSTRUED THE RULE OF *NEW YORK TIMES V. SULLIVAN*, 376 U.S. 254 (1964), AND ITS PROGENY, AND MISAPPLIED SUCH RULE SO AS TO DEPRIVE A PUBLIC OFFICIAL-PLAINTIFF OF HIS RIGHT TO RECOVER IN A DEFAMATION ACTION ON PROOF OF *NEW YORK TIMES* ACTUAL MALICE.

This case presents the important question of the continuing validity of the rule that the first and fourteenth amendments do not bar a public official plaintiff's right to recover in a defamation action where he proves

> [T]hat the statement was made with 'actual malice'—that with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times v. Sullivan, supra, 376 U.S. at

This is not a case, it must be initially emphasized, where a state has exercised its right "to adopt a more severe standard for recovery in such [public figure defamation] cases if it chose to do so," *Brewer v. Memphis Publishing Co., Inc.*, 538 F.2d 699, at 702 (5th Cir. 1976). There is no reliance in the opinion of the Louisiana state court on Louisiana law, the only cases cited therein being *New York Times, St. Amant v. Thompson*, 390 U.S. 727 (1968), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Mashburn v. Collin*, 355 So.2d 879 (La. 1977), *rev'g*, 341 So.2d 1236 (La. App.).

In *Mashburn*, where it was held that a newspaper columnist, who wrote an article derogatory of the food served by the plaintiff's restaurant, was entitled to *New York Times* protection, the Louisiana Supreme Court expressly disclaimed any reliance upon Louisiana state law:

> Because an expression of opinion without knowing or reckless falsity about a matter of public concern by the press is fully protected under the First Amendment aegis, we did not consider to what extent our state constitution, jurisprudence and statutes also protect expression of such opinions. Nor did we attempt to define the ambit of Louisiana's safeguard for defamatory misstatements of fact . . . It is clear that a state is free to adopt any reasonable standard, so long as it affords the minimum protection required by the *New York Times-Gertz* cases. In the

> instant case it was not necessary for us to define such a standard for Louisiana because we found the expressions in question to be opinions fully protected by the minimum federal standards.

355 So. 2d at 891-92.

> Therefore, this is not a proper case for application of: "[T]he settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."

Cramp v. Board of Public Instruction, 368 U.S. 278 at 281 (1961), quoting *Fox Film Corp. v. Muller*, 296 U.S. 207 at 210 (1935). *Accord, Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 at 489 (1965).

Rather, the situation here is analogous to that in the recent case of *Zacchini v. Scripps-Howard Broadcasting Co.*, —— U.S. ——, 97 S.Ct. 2849 (1977), *rev'g*, 47 Ohio St. 224, 351 N.E.2d 454 (1976), an action by an entertainer who claimed infringement of his right of publicity by the defendant's televising of his act, where this Court noted that: "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted," 97 S.Ct. at 2852. However, in view of the Ohio Supreme Court's reliance on federal constitutional authority in reaching its decision, the *Zacchini* court found the case to be a proper one for decision, holding:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal

> issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law.

Id. at 2853-54. Quoting *Missouri v. Mayfield*, 340 U.S. 1 (1950), it was held:

> "[I]f the Supreme Court [of Ohio] held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law."

Id. at 2854, quoting 340 U.S. at 3. *Accord, Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 at 376 (1968).

It is respectfully submitted that, just as the *Zacchini* court held the Ohio Supreme Court's construction and application of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), to be in error, holding:

> We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

97 S.Ct. at 2859, certiorari should be granted here for consideration of the validity of the Louisiana Supreme Court's construction and application of *New York Times* and its progeny.

The line of authority deriving from *New York Times*, constantly emphasizing the "tension [which] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury," *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 343, has never rejected the principle that "important social values . . . underlie

the law of defamation . . .," *Rosenblatt v. Baer*, 383 U.S. 75 at 86 (1966), or accepted the absolutist view of Mr. Justice Black and Mr. Justice Douglas that publishers enjoy an absolute immunity from liability for defamation, including cases of intentional falsity. *See, e.g., New York Times, supra*, 376 U.S. at 733 (concurring opinion); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 170, *rehearing denied*, 389 U.S. 889 (1967) (concurring in part, dissenting in part). To accept such a rule, as held in *Gertz*,

> would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . .

418 U.S. at 342. *Gertz* quoted with approval the view of Mr. Justice Stewart's concurring opinion in *Rosenblatt v. Baer, supra*, that the individual's right to the protection of his own good name:

> "[R]eflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Id., quoting 383 U.S. at 92 (concurring opinion). Mr. Justice Stewart further noted in *Rosenblatt* that:

> The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.
>
> Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests.

383 U.S. at 93-94.

The continuing right of a public official plaintiff to recover on proof of actual malice, as well as the error in the holding of the court below, is pointed up by *St. Amant v. Thompson, supra,* which, as does the case at bar, involved a defamation action by a police official. The *St. Amant* court held:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith . . . **[R]eckleSsness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.**

390 U.S. at 732 (emphasis added). In holding that the court below had misapplied the actual malice standard, *St. Amant* noted, referring to the informant on whose information the defendant relied:

> [T]he most the state court could say was that there was no evidence in the record of [the informant's]

> reputation for veracity, and this fact merely underlines the **failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness** or unsatisfactory experience with him by St. Amant.

Id. at 733 (emphasis added). The low community assessment of many of the instant defendant's informants was inferentially conceded by the court below in this case, but, disregarding *St. Amant,* while citing that case, the court approved the defendant's reliance upon such disreputable class of informants:

> [T]he plaintiff also suggests that the newspaper reporter improperly relied upon information conveyed to him (and corroborated by written statements obtained from them) from gamblers and barmaids as to payoffs or bribes.
>
> We are unable to accept the inference that, therefore, the reporter should not have relied upon information as to bribery conveyed by them.

354 So.2d at 1309.

In *Garrison v. Louisiana,* 379 U.S. 64 (1964), this Court emphasized the fact that the *New York Times* rule is not designed to protect the intentional falsehood or the false statement made with reckless disregard of the truth. The *Garrison* court held:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at

> odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. at 75. The Louisiana Court of Appeal, in this case, expressly found intentional falsehood, as well as reckless disregard. With regard to the article charging the plaintiff with having operated a house of prostitution, the court of appeal found:

> When Anderson published the articles charging Kidder with running a house of prostitution and receiving payoffs for barroom protection, **he knew that they were based on unsubstantiated rumors. When a lead produced information that Kidder was not connected with prostitution or barroom protection, Anderson chose to ignore that source** and to rely on hearsay or dubious information furnished him by the two former policemen. This is the "calculated falsehood" condemned in *Garrison, supra.*

345 So.2d at 939 (emphasis added). A thorough reading of the Louisiana Supreme Court's opinion discloses no indication that that court rejected such finding of fact, although the court did inexplicably state:

> The record discloses no reason for Anderson or his publisher to doubt the trustworthiness of the information received by them and subsequently published.

354 So.2d at 1309. It therefore clearly appears that the court below, while purportedly applying the *New York Times* line of authority, has in fact rejected the aspect of such authority permitting recovery on proof of intentional falsehood or reckless disregard.

The leading case of *Curtis Publishing Co. v. Butts, supra,* is strongly analogous to the case at bar, and provides an additional indication of the error of the court below. The facts in *Butts* showed that the informant relied upon by the publisher in gathering information on the alleged football "fix" there at issue did in fact overhear a conversation between the plaintiff and an opposing coach. Nevertheless, the plurality opinion of this Court found the evidence as to the defendant's conduct sufficient to support recovery:

> The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. **The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support . . .**
>
> Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

388 U.S. at 157-78 (emphasis added). While it is true that the *Butts* plurality applied a standard less than the *New York Times* actual malic standard presently applicable, Chief Justice Warren's concurring opinion, joined by twc other Justices, found the evidence to disclose sufficient *New York Times* actual malice constitutionally to support recovery:

> The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justic HARLAN. Suffice it to say that little investigative effort was expended initially, and **no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue . . .**
>
> I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison*. **Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.**

Id. at 169-70 (concurring opinion) (emphasis added).

Similarly, in the case at bar, the court of appeal, in findings uncontradicted by the Louisiana Supreme Court, found that: "The investigation [the defendants] conducted showed clearly that the accusations which they intended to publish, and did publish, about Kidder, were false." 345 So.2d at 922. As held in *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 377 F. Supp. 421 (D.D.C. 1972):

> But while it is well established that a failure to investigate, without more, is insufficient to give rise to liability, once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation.

337 F. Supp. at 427-28. The decision of the instant defendants to ignore all results of its investigation other than those which tended to support their vendetta against the plaintiff clearly amounts at best, to reckless disregard of truth or falsity.

The Court of Appeal additionally found, in a close analogy to the facts of *Butts*, that:

> [P]rior to publishing the accusation that Kidder, while a member of the Baton Rouge police force, operated a house of prostitution, the defendants had positive information that there was no truth in the rumor that Kidder was once involved in prostitution. It appears from clear and convincing evidence that Anderson, the reporter, **joined with Childers and Spillers, two disgruntled police officers, in a deliberate effort to prevent the appointment of Acting Chief Kidder to the position of Chief of Police.** Anderson's own testimony reveals that his interest in getting rid of Kidder was not that of an objective reporter in bringing "the news" to the reading public.

345 So.2d at 930 (emphasis added). The Louisiana Supreme Court did not reject this factual finding, although it did, in a misinterpretation of *St. Amant*, apparently dismiss such factors as having no bearing on actual malice. 354 So.2d at 1309.

In *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049, *rehearing denied*, 397 U.S. 978 (1970), where it was held that there was sufficient evidence of *New York Times* actual malice to support the plaintiff's defamation judgment against a magazine publisher, the court held that the fact of investigation alone would not negative actual malice. Where the results of such alleged investigation were distorted, as here, to support the defendant's position, its import would, to the contrary, be to support a finding of actual malice. 414 F.2d at 337.

If the Louisiana Supreme Court's apparent construction of the *New York Times* line of authority were to become accepted as authoritative, defamation recovery by public official or public figure plaintiffs would, as a practical matter, become impossible, in the absence of a very rare admission by a defendant that he knew at the time of publication that the statements at issue were false, or that he knew that he had no information supporting his charges. See ***Field Research***

Corp. v. Patrick, 30 Cal. App. 3d 603, 106 Cal. Rptr. 473, *cert. denied*, 414 U.S. 922 (1973); *Sas Jaworsky v. Padfield*, 211 So.2d 122 (La. App. 1968).

Such, however, is not the law, as indicated by the large number of cases, in the federal and state courts, applying the rule that recovery is permissible in cases of knowing falsehood or reckless disregard of truth or falsity. *E.g., Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 160 N.W.2d 1 (1968); *Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970); *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 515 P.2d 154 (1973); *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79 (1975); *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674 (W.Va.), *cert. denied*, 423 U.S. 882, *rehearing denied*, 423 U.S. 991 (1975); *Carey v. Hume*, 390 F. Supp. 1026 (D.D.C. 1975), *aff'd*, 543 F.2d 1389 (2d Cir. 1976); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert, denied*, —— U.S. ——, 46 U.S.L.W. 3390 (1977).

In the *Mahnke* case, as here, the defendant newspaper printed a story relating to a policeman's breach of duty, and did so after being warned by a responsible official, here the mayor of Baton Rouge, and there the police chief, that the story was false. In affirming a judgment for the plaintiff, the *Mahnke* court held as to this point:

> **There is nothing in the evidence to indicate that Chief Winslow's explanation that there had been a misunderstanding was probed.** Neither Captain Hawkinson, Detective Quady, nor plaintiff gave their version before the week-old occurrence was placed on the front page of the afternoon newspaper. The facts that the only news source contacted, Father Meagher, had not been present at the meeting, that **he was then angry at plaintiff,** and that the persons actually present at the meeting could have been and were not contacted, support the jury's finding of recklessness.

160 N.W.2d at 11 (emphasis added). The court noted the parallel between its case and *Butts*, holding:

> As we view it, the evidence considered by the United States Supreme Court in the Butts case has several parallels to the instant case. The court noted that the Butts story was in no sense "hot news." It appears that another person present when defendant's informant supposedly overheard the conversation of Butts upon which the defamatory story was based was not even interviewed. The Supreme Court felt that in the light of the seriousness of the charges against Butts, the Post had ignored "elementary" precautions. The charge that a police officer "flew into a rage" upon learning of the fact that a complaining mother went to a priest before she went to the police and then refused to arrest the man who had molested her 6-year-old daughter, is no less serious. Certainly "elementary" precautions were ignored in the instant case as in the Butts case.

Id. at 12.

Sprouse is also strongly analogous to the case at bar, in that it involved a situation where, as here, a newspaper departed from its role of reporting, and commenting upon, the news, and became a part of a scheme to destroy the reputation of a public official through use of misleading headlines, and distortion of the facts. In this case, the defendants joined with a group of disgruntled police officers to destroy the reputation of their police chief, while in *Sprouse*, the defendant joined with a candidate for governor to destroy the reputation of an opposing candidate. The *Sprouse* court held:

> The cases of Curtis Publishing Company v. Butts, and its companion case, Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) stand for the proposition that when a newspaper departs from an attempt to report the news objectively, the fact of such departure can be considered by the jury and an appellate court in determining whether there was willful disregard of truth.

211 S.E.2d at 687. The court further held, relevantly to the instant case:

> [I]t should be emphasized that the Court sustains the jury's finding of libel in this case because the plaintiff proved that the newspaper abdicated its traditional role of fairly reporting the news and became a participant in a scheme or plan, the object of which was to employ grossly exaggerated and patently untrue assertions, embodied primarily in headlines, to destroy the character of Sprouse. It appears from the evidence that not only did the **Mail** work closely with the Moore campaign staff to discover the details of the land transaction, but also that it fully cooperated in disseminating the articles to other newspapers for publication throughout the State. Under those circumstances the difference between the fair implication of the headlines as opposed to the supporting factual recitation of the stories is evidence alone of malice, which absent evidence to the contrary, supports the jury verdict.

Id. at 691-92. This case also involved misleading headlines, in the story concerning the plaintiff's assessment, but it is emphasized that the case at bar is substantially stronger than *Sprouse* from the plaintiff's point of view, in that, as discussed herein, there is clear and convincing evidence of intentional falsehood on the part of the defendants.

> As held in *Edwards, supra,* citing *Goldwater*:
> It is equally clear . . . that a publisher who in fact espouses or concurs in the charges made by others,

> or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations.

556 F.2d at 120. It is respectfully contended that if the decision of the court below is permitted to stand, the validity of the principle that "the constitutional guarantees can tolerate sanctions against **calculated** falsehood without significant impairment of their essential function," *Time, Inc. v. Hill, supra,* 385 U.S. at 389 (Court's emphasis), will be all but eliminated, and the heretofore repudiated principle advocating absolute immunity for intentional and reckless defamers will come to prevail. The Court should grant certiorari to repudiate the Louisiana Supreme Court's misconstruction of Federal constitutional law applicable to public official-public figure defamation actions.

The importance of this case is magnified by the Louisiana court's holding that, under the circumstances of the case, the defendant's motion for summary judgment should have been granted. 354 So.2d at 1310. While such holding was not necessary to the decision of the case, it is nevertheless contended that the question of whether, as held by the court below, a public official-defamation plaintiff must prove *New York Times* actual malice with convincing clarity *before* going to trial, is of such crucial importance to a determination of the rights of parties to such actions under federal constitutional law as to justify a decision on the merits by this Court.

The argument for the granting of certiorari, and decision on this question is buttressed by the conflict which has developed among the federal circuit courts as to whether *New York Times* and its progeny requires the granting of a defendant's motion for summary judgment unless he can prove *New York Times* actual malice prior to the commencement of trial. The Louisiana Supreme Court ,quoting the opinion of the dissenting judge in the court of appeals, 354 So.2d at

1310, quoting 345 So.2d at 948 (dissenting opinion), adopted the view, most clearly articulated by the opinions of the fifth and D.C. circuits, that normal rules relating to the granting of summary judgments are not applicable in *New York Times* defamation actions. *E.g., Time, Inc. v. McLaney,* 406 F.2d 565 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858 (5th Cir. 1970); *Washington Post Co. v. Keogh,* 365 F.2d 965 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967); *Thompson v. Evening Star Newspaper Co.,* 394 F.2d 774 (D.C. Cir.), *cert. denied,* 393 U.S. 884 (1968); *Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir.) (concurring opinion), *cert. denied,* 398 U.S. 940 (1970). In *Keogh,* a defamation action by a congressman, the court, after recognizing the general rules, said:

> [S]ummary judgment must be denied when there is "doubt" whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind.

365 F.2d at 967. In *Bon Air Hotel,* the fifth circuit quoted with approval the concurring opinion in *Wasserman,* where it was held:

> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. Cf. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant.

426 F.2d at 864.

In *Guam Federation of Teachers v. Ysrael,* 492 F.2d 438 (9th Cir.) *cert. denied,* 419 U.S. 872 (1974), however,

the court, in reversing a judgment for the plaintiff in a *New York Times* defamation action, rejected the view that the trial judge in a *New York Times* defamation action had a duty to weigh the evidence. The *Ysrael* court held, correctly it is contended:

> [W]ith respect, we are not persuaded by the second phase of Judge Wright's analysis in *Wasserman* which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, . . . is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact.

492 F.2d at 441.

It is respectfully asserted that the question presented by this case, involving the right of a public official-defamation plaintiff to recover if he can meet the standard of actual malice established by the *New York Times* line of authority, is a vitally important issue, transcending the interests of the parties hereto. If the heretofore repudiated standard of absolute immunity is to become the law, such principle should be established by this Court, rather than by the lower court's erroneous interpretation of the opinions of this Court.

II. BY SUMMARILY OVERRULING THE JURY'S VERDICT FOR THE PLAINTIFF WITHOUT FINDING THAT THERE WAS NO CREDIBLE EVIDENCE IN SUPPORT OF SUCH VERDICT, THE LOUISIANA SUPREME COURT VIOLATED THE PLAINTIFF'S SEVENTH AND FOURTEENTH AMENDMENT RIGHT TO TRIAL BY JURY.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of

> trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law.

It is the contention of the plaintiff that this right to trial by jury is so basic and fundamental a principle of liberty and justice as to be protected against state invasion by the due process clause of the Fourteenth Amendment.

It is, of course, recognized that there is substantial early authority holding to the contrary. *E.g., Edwards v. Elliott,* 88 U.S. 532 (1874); *Walker v. Sauvinet,* 92 U.S. 90 (1875); and *Wagner Electric Manufacturing Co. v. Lynden,* 262 U.S. 226 (1923). As pointed out by Mr. Justice Brennan, however, "these are rather ancient cases." 12 *N.Y.U.L. Cen. Bull.* 5 at 6 (1963) (Address, November 16, 1962). Mr. Justice Brennan further commented therein, indicating the reasons why the question of the applicability of the Seventh Amendment to the states is one of great national importance, and one which should be considered by this Court:

> But since 1922, hasn't there been a lot of new, and I say advisedly, different constitutional law made over those 40 years, in the area of the application of the Bill of Rights to the States.
>
> . . . .
>
> [O]nly few of the specifics of the Bill of Rights have not been extended to the States. And the most notable not yet extended to the States, are the provisions of the fifth amendment against double jeopardy and self-incrimination and the provision of the seventh amendment which we are considering today.
>
> . . . .
>
> Now I don't think that we can be sure that the process of extension by absorption has yet run its course; . . .
>
> . . . .

> I haven't had the time to do any research on the question whether the 7th amendment has been interposed against the constitutionality of statutes of the foregoing kind. I can only repeat again, I know of no such case that has come to the court in my time. **I am sure, however, that there is some considerable American tradition in support of the right to trial by jury in civil courts.**

Id. at 6-7 (emphasis added).

It is also recognized that, in *Melancon v. McKeithen,* 345 F.Supp. 1025 (E.D. La.) (three judge court), *aff'd sub nom. Hill v. McKeithen,* 409 U.S. 943 (1972); *Davis v. Edwards,* 409 U.S. 1098 (1973), it was held, over a persuasive and well reasoned dissent:

> [A]bsent "total incorporation" a civil jury trial is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the state by due process . . .

345 F.Supp. at 1045. It is emphasized, however, that this Court's affirmance of *Melancon* was a summary one, without opinion, and it has been recently held that "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel v. Bradley,* —— U.S. ——, 97 S.Ct. 2238 at 2240 (1977). The *Mandel* Court further held:

> **Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.**

Accord, Edelman v. Jordan, 415 U.S. 651, *rehearing denied,* 416 U.S. 1000 (1974); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). In *Fusari v. Steinberg,* 419 U.S. 379, *rehearing denied,* 420 U.S. 955 (1975), the Chief Justice criticized the practice of using a district court opinion summarily affirmed by the Supreme Court to define this Court's judgment, noting:

> When we summarily affirm, without opinion, the judgment of a three judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affrimance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.

419 U.S. at 392-93 (concurring opinion).

It is contended that this case presents an appropriate vehicle for the Court's consideration of whether the fourteenth amendment permits the states to deprive civil litigants of the fundamental right of trial by jury. It has been recently noted that "the Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States." *Colgrove v. Battin,* 413 U.S. 149 at 169 (1973) (Marshall, J., concurring). In *Duncan v. Louisiana,* 391 U.S. 145, *rehearing denied,* 392 U.S. 947 (1968), this Court held, in construing the sixth amendment guarantee of jury trials in criminal prosecutions:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee.

391 U.S. at 149. It is contended that the right to trial by jury in civil actions is equally fundamental to the American scheme of justice, and that the dissenting judge in *Melancon, supra,* was correct in arguing:

> I cannot subscribe to the view that the right to a meaningful trial by jury in civil cases is not a fundamental right. No one could seriously question the fact that the right to trial by jury in Federal Courts is protected by the Seventh Amendment, and no one could seriously question the fact that in the federal system, the facts found by the jury may not be reexamined by an appellate court except according to the rules of common law. **I believe that the right to trial by jury as provided for in the Seventh Amendment to the United States Constitution is as fundamental a right as those contained in the remainder of the first eight Amendments,** and that thus, the guarantees of the Seventh Amendment should be held to be operative on the States through the fourteenth amendment. I believe that the Seventh Amendment prohibits the States from granting a right to trial by jury in civil cases on the one hand, and then, on the other hand, as is done in Louisiana, nullifying the total effect of the jury trial by allowing the Appellate Judges to set aside the findings of the juries simply because they personally do not agree with those findings.

345 F.Supp. at 1062 (emphasis added).

It is significant that the *Duncan* court, in discussing application of the Bill of Rights to the states, through the fourteenth amendment, noted that, in contrast to earlier cases, such as *Palko v. Connecticut,* 302 U.S. 319 (1937) which,

> can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.

391 U.S. at 149, n. 14, the more recent cases,

> have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.

Id. at 149-50, n. 14. In rejecting the assertion that the denial of civil jury trials is unfair by pointing to foreign countries which have abandoned such jury trials, the *Melancon* court, 345 F.Supp. at 1035, ignored *Duncan's* holding that the particular procedure at issue — here a civil jury trial — must be seen as fundamental within the *American* system of justice.

That such is the case with regard to the right of civil litigants to trial by jury under the seventh amendment has been repeatedly held from the earliest days of our legal system. In *Parsons v. Bedford*, 3 Peters (28 U.S.) 433 (1830), it was held:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealously. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

28 U.S. at 445. Mr. Justice Story further significantly held in *Parsons*:

> But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. "No fact tried by a jury shall be otherwise re-examinable, in any Court of the United States, than according to the rules of the common law." This is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to reexamine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate Court, for some error of law which intervened in the proceedings.

Id. at 447. If the right to a jury trial in civil cases was, as held in *Parsons*, a "fundamental guarantee of the rights and liberties of the people," *id.* at 445, in 1830, it would indeed be anamolous for this Court to decline to even hear an argument that such fundamental guarantee must be made available to state litigants in 1978.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), where this Court overruled *Betts v. Brady*, 316 U.S. 445 (1942), in holding that the sixth amendment right to the assistance of counsel was made applicable to the states by the fourteenth amendment, the Court noted that prior to *Betts*, it had held in *Powell v. Alabama*, 287 U.S. 45 (1932), that "the right to counsel is of this fundamental character," 372 U.S. at 342-43, citing 287 U.S. at 68. The *Gideon* Court quoted *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), where it was held that, in Powell:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Four-

> teenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

372 U.S. at 343, quoting, 297 U.S. at 243-44. *Gideon* then held:

> In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.

372 U.S. at 344. Similarly, it is contended that the Court should return to sounder precedents holding the civil jury, and the guarantee against re-examination of facts found by such jury, to be fundamental to liberty. Such a holding, in light of present law as to incorporation would, as a corollary, require a holding that the seventh amendment be applicable to the states by the fourteenth.

The importance of the rights guaranteed by the seventh amendment was pointed up in *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897), where it was held that the prohibition against re-examination of facts is not confined to cases tried before juries in federal courts, but "applies equally to a case tried before a jury in a state court, and brought here . . . from the highest court of the state." 166 U.S. at 243-44. That case was cited with approval in *New York Times*, 376 U.S. at 285, fn. 26, but distinguished on grounds that the ban on a re-examination of the facts "does not preclude us from determining whether governing rules of federal law have been properly applied to the facts." *Id.* In this case, the plaintiff does not, of course, contest the right of the Court to make such an examination, as, indeed, the Louisiana Court of Appeal did in affirming the judgment for him. 345 So.2d at 942. The objection here is that the Louisiana Supreme Court went far beyond such function, and in

weighing the evidence, violated the plaintiff's seventh amendment rights.

In *Dimick v. Schiedt*, 293 U.S. 474 (1934), this Court vigorously defended the fundamental importance of the civil jury trial, holding:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy." (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution § 1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and juurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

293 U.S. at 485-86. The importance of the right to a civil jury was again stated in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), where it was held:

> This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

359 U.S. at 510-11. *Accord, Dairy Queen, Inc. v. Wood*, 369 U.S. 469 at 472 (1962). In *Curtis v. Loether*, 415 U.S. 189 (1974), seventh amendment rights were considered sufficiently important so as to require a jury trial for the defendant in an employment discrimination suit under 42

U.S.C.A. § 3612. The Court regarded the considerations peculiar to civil rights actions as "insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 199. This Court's recent Sixth Amendment decision in *Ballew v. Georgia*, —— U.S. ——, 46 U.S.L.W. 4217 (1978), provides further analogous support for the fundamental and basic nature of the jury trial in the American system of justice.

What is at stake here is the right of all civil litigants, as well as those party to defamation actions, to a meaningful trial by jury, the outcome of which cannot be overruled merely because a trial judge disagrees with the factual findings of the jury. This is an issue of major national importance. As held in *Jacob v. City of New York*, 315 U.S. 752 (1942):

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

315 U.S. at 752-53. In view of this Court's frequent characterization of the civil jury trial in such terms, taken in conjunction with the Court's use of barely distinguishable language in holding particular features of the Bill of Rights applicable to the states, *e.g., Gideon v. Wainwright, supra*, 372 U.S. at 342-43; *Duncan v. Louisiana, supra*, 391 U.S. at 148-49; *Klopfer v. North Carolina*, 386 U.S. 231 at 223-26 (1967); and *Washington v. Texas*, 388 U.S. 14, at 17-18 (1967) it is clear that the time is ripe for consideration and determination of the applicability of the seventh amendment under these circumstances. This case, where the highest court of a state has deprived a party of a jury verdict, on the apparent basis of mere disagreement with the jury, presents an appropriate vehicle for such determination.

CONCLUSION

Petitioners respectfully urge the Court to hear and resolve the two highly important issues presented by this case. Each of these issues, involving the Louisiana court's erroneous construction of the *New York Times* rule, and the application of the fundamental constitutional right of trial by jury to the states, is of a significance surmounting the rights of the parties to this action. Each issue is clearly presented by the facts of this case, and the determination of each will make a major contribution to the advancement of a sound and consistent body of constitutional law.

Respectfully submitted,

ORIGINAL SIGNED BY
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PROOF OF SERVICE

I, ROBERT L. KLEINPETER, Attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of May, 1978, I served three copies of the petition for a writ of certiorari on respondents, Capital City Press and Bob Anderson, by mailing the same, through the United States mail to counsel of record, Mr. Frank W. Middleton, Jr., P. O. Box 2471, Baton Rouge, Louisiana, first class, postage prepaid.

All parties required to be served with copies of this opposition have been served.

May 30, 1978.

ORIGINAL SIGNED BY
ROBERT L. KLEINPETER
Robert L. Kleinpeter

APPENDIX A

HOWARD A. KIDDER

Versus

**BOB ANDERSON AND
CAPITAL CITY PRESS, INC.**

Number: 11,205

**First Circuit Court of Appeal
State of Louisiana**

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, HONORABLE ELVEN E. PONDER, JUDGE.

BEFORE: SARTAIN, COVINGTON AND LOTTINGER, JJ.
COVINGTON, JUDGE.

This is a defamation action by Howard A. Kidder, Acting Chief of Police, against Bob Anderson, newspaper reporter, and Capital City Press, Inc., the owner and publisher of the Morning Advocate and State Times newspapers and the employer of Bob Anderson, for damages in the amount of five and one-half million dollars, arising out of several newspaper articles and editorials appearing in the newspapers, in one or the other or both, from June 12, 1974, through August 8, 1974. The plaintiff alleged that the "offending statements" published by the defendants were calculated to degrade him and to hold him up to public ridicule in that they depicted him, a law enforcement officer, as operating a house of prostitution, as engaging in illicit dealings with barroom proprietors and gamblers, and as using the influence of his office for personal gain.

The defendants denied that the "offending statements" were defamatory. They also expressly pleaded constitutional

rights under the First Amendment of the United States Constitution, and truth, as defenses.

During the course of the proceedings, the defendants moved for partial summary judgments, primarily based on the failure of the plaintiff to show sufficient evidence of "actual malice" to let the case go to the jury.

The motions for partial summary judgment were denied by the lower court. Then, applications for supervisory writs were made to the Court of Appeal and the Supreme Court for review of the summary judgment denials. Both appellate courts declined the applications for writs, finding no error in the lower court's finding of genuine issues of material facts in dispute.

The case then proceeded to trial by jury. After an eight-day trial, the jury returned a verdict in favor of the plaintiff, awarding damages in the amount of $400,000.00. From the judgment implementing the jury's verdict, the defendants have suspensively appealed.

SPECIFICATION OF ERROR NO. 1

The trial court properly denied both motions for partial summary judgment. It is only when there is no genuine issue as to a material fact that the mover is entitled to summary judgment. LSA-C.C.P. art. 966. In ruling on such a motion, it is not the function of the lower court to determine the merits of the issues raised; its function is to determine whethere or not there is a genuine issue of material fact. *Metoyer v. Aetna Insurance Company*, 278 So.2d 847 (La. App. 3 Cir. 1973).

In *Batson v. Time, Inc.*, 298 So.2d 100 (La. App. 1 Cir. 1974), writ den. 299 So.2d 803, we had occasion to consider a motion for summary judgment; and, in sustaining the lower

court's rejection of a motion for summary judgment, we acknowledged "the chilling effects of a lengthy and costly trial" on First Amendment rights, and then remarked:

> "Equally pertinent, however, is the well established rule that in cases of this nature, the courts are most careful to protect plaintiff's right to jury trial, when disposing of a motion for summary judgment pursuant to F.R. Civ. P. Rule 56. In applying Rule 56, the courts note the Rule's provision that, on trial of a motion for summary judgment, plaintiff may not rely upon his pleadings, but must, by affidavit or otherwise, set forth facts and allegations which establish the existence of a genuine issue of material fact. Also in applying Rule 56, the courts grant summary judgment where the pleadings, depositions, answers to interrogatories, affidavits and admissions disclose the absence of a genuine issue of material fact.
>
> "More importantly, the Federal cases have repeatedly held that in a defamation action, as in other actions, the adverse party against whom summary judgment is requested is entitled to have all the evidence, depositions, affidavits and inferences reasonably drawn from them, viewed in the light most favorable to him in determining whether he has shown the existence of a genuine issue of material fact."

The guidelines for the use of the summary judgment procedure as authorized by LSA-C.C.P. art. 966 are well established. They are succinctly stated in the case of *Roy & Roy v. Riddle*, 187 So.2d 492 (La. App. 3 Cir. 1966), writ ref. 249 La. 724, 190 So.2d 236, as follows:

> "The courts have noted repeatedly that the summary judgment remedy is not a substitute for a trial and may not be resorted to when there is a genuine issue of material fact which must be resolved. In passing upon a motion for summary judgment, the function of the court is not to determine the merits of the

issues raised, but rather only to determine whether or not there is a genuine issue of material fact. To obtain a summary judgment it is not sufficient to prove that it is unlikely that the plaintiff may recover, nor that the showing then made preponderantly indicates there is no liability. The burden of showing that there is not a material factual issue is upon the mover for summary judgment. All doubts are to be resolved against the granting of a summary judgment and in favor of a trial on the merits to resolve disputed facts."

Turning to the federal jurisprudence for guidance, we find the Court of Appeals, Ninth Circuit, in *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438 (C.A. 9 1974) stated:

"However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in *Wasserman* which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, where no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

"The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be

examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the Trial Judge did in this case."

We also find the language of *Whitaker v. Coleman*, 115 F.2d 305 (C.A. 5 1940), particularly applicable to a case of this nature:

"Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right to trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

We think too that 10 Wright and Miller, Federal Practice and Procedure, Civil section 2712, pp. 387-389, Rule 56, places the summary judgment in proper perspective:

"Since its impact is rather drastic, summary judgment must be used with a due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. As stated by the Tenth Circuit in Avrick v. Rockmont Envelope Company (155 F.2d 568, 571, C.A. 10 1946): 'The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification'."

With the foregoing law in mind, we have reviewed the pleadings, exhibits, affidavits and other evidence available for consideration by the court on the motions for summary judgment. The affidavits filed by movers do not measure up to

the standard set out by LSA-C.C.P. art. 967. They fail to affirmatively show that the facts set forth in the affidavits were matters within the personal knowledge of the affiants. We said in *Benoit v. Burger Chef Systems of Lafayette, Inc.*, 257 So.2d 439 (La. App. 1 Cir. 1972):

> "Therefore, when mover relies on the personal knowledge of an affiant to establish the nonexistence of a genuine issue of fact and fails to assert facts which would affirmatively show the affiant's competency to testify to such facts, his proof of the same fails by reason of the insufficiency of the affidavit. LSA-C.C.P. Art. 967."

We find that the proof of the mover fails to establish the nonexistence of genuine issues of fact in the instant case.

We agree with the trial judge that there were genuine issues of material facts, even if we accepted movers' affidavits, and that it was proper for the case to go to trial by jury. The plaintiff's evidence was sufficient to meet the *New York Times* standard. We interpret the *Guam* case as completely refuting the view of Judge Wright in *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970), followed in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5 Cir. 1970). There is no acceptance by the Federal courts that the court must weigh or re-weigh the evidence or determine the credibility of the witnesses, and that the proof must be with "convincing clarity". The function of both the federal and state courts is to determine whether or not the plaintiff has presented a genuine issue of material fact from which a jury could find that the publisher published the article with actual knowledge of its falsity or with a reckless disregard as to whether it was false, i. e., with "actual malice". In the pretrial stage, the plaintiff certainly is not required to prove "actual malice with convincing clarity" (as he must do in order to prevail on trial per the *New York Times* standard), because that would require a weighing of the proof, which

Guam says is not to be done by the trial judge. Rather, at that stage of the proceeding, the plaintiff need only present evidence which shows that there is a genuine issue of material fact from which a jury could find actual malice.

Where the crucial fact in a case is a predominantly subjective one, such as "actual malice" in the instant case, it would seem to us to be placing an unconstitutional burden on a plaintiff to require him to file an "affidavit" based on "personal knowledge" that the publisher of an alleged defamatory statement did so with "actual malice", and to prove this predominantly subjective factor by clean and convincing evidence, submitted in a pre-trial procedure, under penalty of forfeiture of his right to trial by jury in the absence thereof.[1] We believe that it is better that an occasional publisher get slightly frostbitten than that the cold-shoulder of injustice be eternally turned toward the defamed public official, if it can be truly said that any trial has a "chilling effect" on the news media. We believe that the practitioners of the journalistic art are hardier souls than some of our esteemed brethren believe. We believe that it would take more than a threat of a libel action to still the voice of a newspaper or to blunt the pen of a newswriter, or to dull the wit of either. We do not presume that the John Peter Zengers have all faded into the obscure pages of history.

We believe that if the First Amendment were repealed tomorrow, the newspeople of this nation would not skip a heartbeat or a deadline; they would continue to fearlessly bring to their readers and listeners all the news that's fit to print and hear. To hold a newsperson accountable for his transgressions is not to censor him, it is merely to make him mindful of the awesome responsibility he has to the public. Accountability is not a clarion call of "stop the press"; it is but a whisper for respect for the people who make the news. After all, it is not the first amendment that makes a newspaper great; it is the front page.

We believe the trial court could only find on the basis of the pleadings, exhibits, affidavits and other available evidence that the plaintiff would have been able to prove "actual malice" by clear and convincing evidence, and we agree with the trial court that he should have been given the opportunity to do so.

SPECIFICATION OF ERROR NO. 2

This assignment of error is the crux of the case. The appellants contend that the jury erred as a matter of law in finding liability on the part of the defendants. The basis for this contention is that the jury did not properly apply the *New York Times* standard in reaching its verdict.

We have reviewed the evidence, first, as a reviewing court, to see if the jury committed manifest error in reaching its verdict; and secondly, as a reconsidering court directed by *Gonzales v. Xerox Corporation*, 320 So.2d 163 (La. 1975), to examine the evidence as a trier of fact, in order to render a judgment based on the record. Our careful review of the record convinces us that the jury's verdict as to liability is supported by ample and sufficient evidence, and the jury did not commit manifest error in its verdict; and we are persuaded that the liability of defendants has been proven by "clear and convincing evidence" within the *New York Times* standard.

We are, of course, mindful that "in order for there to be a free and vigorous press it must have 'breathing space' between the First Amendment on the one hand, and libel actions, on the other hand." See *Carey v. Hume*, 390 F.Supp. 1026 (U.S.D.C., D.C., 1975). Thus, under the *New York Times* standard, a "public person" must show that the defamatory falsehood was published with "actual malice," in order to recover damages. See Note, 39 Tul.L. Rev. at page 360 (1965).

It is succinctly stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that:

> "The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person."

Since the plaintiff is admittedly a "public official," the *New York Times* standard is clearly applicable to determine the defamatory nature of the publications which give rise to the instant action for defamation.

The applicable standard was first enunciated by the United States Supreme Court in the case whose name it carries, *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), as follows:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 84 S.Ct. at 726.

In *Carson v. Allied News Company*, 529 F.2d 206 (C.A. 7 1976), the court commented:

> "'Actual malice' has become a term of art to provide a convenient shorthand for the *New York Times* standard of liability. It is quite different from the common law standard of 'malice' generally required under state tort law to support an award of punitive damages. Whereas the common law standard focuses on the defendant's attitude toward the plaintiff 'actual malice' concentrates on the defendant's attitude toward the truth or falsity of the material published."

Although the *New York Times* case does not exactly define "actual malice," it does provide criteria for its ascertainment, either knowledge of the falsity, or reckless disregard for the truth will meet the test of "actual malice."

In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the United States Supreme Court "refined its standard," stating that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." See *Washington Post Company v. Keogh*, 365 F.2d 965 (C.A., D.C. 1966).

In *Garrison* the Court emphasized:

> "The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." 85 S.Ct. at 218.

The Court, in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), explained:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

In *Carson, supra*, at 209, the court explained:

> "Examples of reckless disregard expressly given by the Supreme Court include where a story is fabricated by the defendant, is the product of his imagination, is based wholly upon an unverified anonymous telephone call, or where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Not only must the plaintiff in a defamation case meet the standard of "actual malice," he must bear the burden of proving with convincing clarity that the statements were false and that the false statements about him were made with "actual malice"; "actual malice" is never presumed. *St. Amant v. Thompson, supra.*

Moreover, in *St. Amant* the court said that it is "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." Thus, the federal rule which the plaintiff must comply with to prevail in the instant case can be stated: the plaintiff must prove with clear and convincing evidence that these particular defendants, with knowledge of falsity or a reckless disregard as to whether the publication was true or false, have defamed him by publishing a falsehood about him.

The test is stringent and the burden heavy on a public person in a defamation action. Hence, in light of the standard and the evidential burden on the plaintiff, to decide whether the press published the "offending statements" with "willful knowledge" or "reckless disregard" of their falsity is not an easy task for the trier of fact.

The central issue in this case is, thus, whether the facts bring it within the rule of the *New York Times* case, as to "constitutional malice" and "proof of convincing clarity."

It is primarily the defendants' contention that under the federal standard there was no basis for liability against them, and that the jury erred in finding them liable. The defendants' position is that, under *New York Times Company v. Sullivan, supra,* they are not liable for the "offending statements" made about Kidder even if they were false, because plaintiff failed to prove with convincing clarity "actual malice" on the part of the defendants. We find their position untenable.

The evidence fully substantiates that the defendants acted in reckless disregard of the falsity or truth of the statements which they published about Acting Chief Kidder. This is not a case of a failure to investigate by the defendants. See *St. Amant v. Thompson, supra.* The investigation they conducted showed clearly that the accusations which they intended to publish, and did publish, about Kidder were false. The "calculated falsehood," according to *Garrison,* puts "a different cast" on the question. For example, prior to publishing the accusation that Kidder, while a member of the Baton Rouge police force, operate a house of prostitution, the defendants had positive information that there was no truth in the rumor that Kidder was once involved in prostitution. It appears from clear and convincing evidence that Anderson, the reporter, joined with Childers and Spillers, two disgruntled police officers, in a deliberate effort to prevent the appointment of Acting Chief Kidder to the position of Chief of Police. Anderson's own testimony reveals that his interest in getting rid of Kidder was not that of an objective reporter in bringing "the news" to the reading public.

Bob Anderson testified as follows, regarding undercover investigations unrelated to Kidder:

"Q. And you knew that they (Childers and Spillers) gave you information that they refused to give to the Chief of Police, didn't you?

A. Yes, sir, the Acting Chief of Police.

Q. And with this knowledge, knowing that they were more loyal to you as a newspaper reporter or investigative reporter than they were to their employer, you accepted their assistance and continued these investigations.

A. Yes, sir."

The facts show that in May, 1974 the defendant's newspaper had high praise for Kidder and congratulated the Mayor for making such a good choice for the command of the Baton Rouge Police Department. In an editorial, in the State Times on May 2, 1974, the following comments were made:

"CHANGE IN COMMAND

"Lt. Col. Howard Kidder, as acting Chief, now has immediate command of the Baton Rouge Police Department. The designation of him by Mayor-President Dumas is related to the current hospitalization absence of Chief Rudolph Ratcliff and the latter's publicly proclaimed intention to leave the city department in a few weeks to become a candidate for Sheriff in Livingston Parish, his homeground.

"Col. Kidder is an intelligent man, whose police career runs the gamut from beat patrolman to the acting Chiefship he now occupies. Presumably the 'acting' will be dropped with the formal departure of Chief Ratcliff. Col. Kidder has long demonstrated exceptional ability as an administrator, without having lost touch with the very human problems of the officer on patrol in night's lonely hours.

"On the record he already has behind him, acting Chief Kidder will maintain an 'open door' office to

department, press and to the public at large. What he says, he means; what he means, he says.

"The mayor-president had some multiple choices in meeting the police department contingency at hand. Without derogation to any of the others, the choice made was a good one."

Then, a complete about-face was taken by the press. There followed a series of newspaper stories attacking Acting Chief Kidder, which form the basis of this lawsuit: ten newspaper articles or pictures and one editorial, copies of which were offered in evidence by the plaintiff. These articles, and the balance of the evidence in the case, can be grouped into **five subjects** for analysis and discussion. (Several subjects or stories were covered by similar articles in both the morning and afternoon newspapers). The five subjects, and the articles pertaining to each, are:

1. **Barroom Protection:**

"Statements Say Police Officials Protected Gambling, Barrooms", an article appearing in the Sunday Advocate on July 14, 1974.

2. **Assessments on Mr. Kidder's Property:**

"Kidder-Owned Duplex", a picture and caption appearing in the State Times on July 17, 1974.

"Kidder Rental House Got Cut in Assessment", article appearing in the State Times on July 17, 1974.

"Policeman's Property", a picture and caption appearing in the Morning Advocate on July 18, 1974.

3. **Harrassment of a Police Officer:**

"Harrassment Is Claimed By Officer", article appearing in the Morning Advocate on July 17, 1974.

"Officer Says Job Change Harrassment", an article appearing in the State Times on July 17, 1974.

4. **Involvement In A House of Prostitution:**

"Kidder Reported Once Involved in Prostitution", an article appearing in the Morning Advocate on August 8, 1974.

"Kidder Reportedly Was Bawdy House Operator", an article appearing in the State Times on August 8, 1974.

5. **Police Uniforms:**

"Baton Rouge Police Uniforms Criticized", an article appearing in the Morning Advocate on June 12, 1974.

1. **Barroom Protection:**

This is a lengthy article written by Anderson which appeared in the Sunday Advocate, on July 14, 1974. The first four paragraphs of this story contain a general summary of the information and reports contained in the remainder of the story. These first four paragraphs read as follows:

(1) "Acting Police Chief Howard Kidder and several other high police officials have a history of protecting some barrooms and gambling operations, according to statements from police officers and other informed sources.

(2) "Allegations of payoffs and gratuities are also contained in the statements.

(3) "Among the statements are notarized affidavits from two barroom employees who say they have witnessed Kidder receiving free liquor and signed statements from a number of police officers who say they have been stopped from making cases against certain barrooms.

(4) "Statements from other officers recount being told by gambling and barroom figures of payoffs

and gifts they have given Kidder and other officers."

Paragraphs five and six relate that various statements have been given to state and federal investigatory agencies, and read as follows:

(5) "The Morning Advocate, with the consent of the persons who have given the statements, has turned the statements over to state Attorney General William Guste's office, which is currently investigating corruption and influence peddling in East Baton Rouge Parish.

(6) "Copies of the statements have also been given to U.S. Attorney Doug Gonzales."

Paragraph seven relates that the District Attorney, had rescued himself from conducting an investigation, and reads as follows:

(7) "District Attorney Ossie Brown recused himself from investigation of alleged wrongdoing by local officials in May when two police officers charged that Brown and Kidder had attempted to obstruct their investigation into such matters."

Paragraphs eight through eleven read as follows:

(8) "An affidavit from one barroom employee tells of Kidder coming into the lounge and accepting two cases of free liquor; the employee recounts being told by the owner that the man was Kidder and being instructed not to say anything about it to anyone.

(9) "That affidavit, supported by an affidavit from a second employee of the same establishment, recounts another incident in which Kidder and a young woman had several drinks with the owner, after which Kidder was presented with bottles of liquor, all without charge.

(10) "Most importantly, that incident occurred since Kidder has become Chief, the employees say.

(11) "One of the employees states that the owner of the establishment has said they have nothing to worry from the law because of their relationship with Kidder."

The evidence pertaining to the "Barroom Protection" aspect of the case shows with convincing clarity that the defendants' investigation led them to the conclusion that the charges against Kidder were based solely on rumor and statements of witnesses who had no evidential basis for their accusations against Kidder. There is clear and convincing evidence that the "Barroom Protection" story was of doubtful truthfulness and that the defendants' investigation led them to this conclusion; yet, they chose to publish the rumors as though they were substantiated facts.

In spite of the fact that Anderson admitted being aware of a press conference called by the Mayor during which the Mayor informed the news media that there was nothing against Kidder but rumors, all of which had been thoroughly investigated and found to be baseless, Anderson proceeded to obtain certain written statements "in support" of his story. Interestingly enough, Childers and Spillers were with him when he interviewed 15 to 20 different persons.

The statements obtained by Anderson-Childers-Spillers fail to substantiate the "Barroom Protection" charges against Kidder. Not one iota of credible evidence connected Kidder with any illegal protection racket.

Exhibit D-1 is an affidavit by Annette Kelly relating an instance when she says she saw Madge DeSoto at the Saville Bar give Kidder and a woman, supposedly, Joan Dipoala, some unopened fifths of liquor, and D-2 is a statement obtained from Yvonne Kelly, a twin sister of Annette Kelly. Madge

DeSoto testified that she had known Kidder as an officer for some 20 years and that her business, Saville Bar, situated at 2231 North Foster Drive, Baton Rouge, Louisiana, was next to the Paramount Sheet Metal Company which was owned by Vic Filardo and Rosemary Paccacio, who are the brother-in-law and sister-in-law of Kidder. Madge DeSoto related that Kidder was in her bar shortly after becoming Acting Chief of Police, together with his wife, and that she gave a bottle of Kahlua to Mrs. Kidder and also an empty bottle which had an odd shape to add to Mrs. Kidder's bottle collection. She stated that nothing was given to Kidder and at that time neither of the Kelly sisters were in the bar. She also stated that she always charged Kidder for anything he got in her bar, and that she ran a small neighborhood bar, did not violate the law, and did not stay open late, so as to need any protection from any law enforcement officer. One of the Kelly sisters testified that Madge DeSoto didn't do anything which would require police protection, inasmuch as the bar did not stay open late, and did not have any gambling or prostitutes on the premises.

Exhibit D-3 is a statement obtained from officer Larry Rogers, a patrolman, about an incident which occurred in the fall of 1972 when Mario Vaccaro supposedly told detectives to do "detective work" and that he would take care of the "uniform work", none of which related to Howard A. Kidder. Exhibit D-4 is a statement of Police Detective Buller, relating to an incident which occurred at the Alibi Lounge on Florida Street when Mario Vaccaro was present, and also another incident involving another lounge some four or five years earlier, which again did not relate to Kidder. Exhibit D-5 is a statement from Officer Crittenden, relating to an occurrence which took place, either in 1971 or 1972, involving Howard Dixon, Lt. Jeter and Capt. Vaccaro at the Tijuana Club, but again did not involve Kidder.

Exhibit D-6 is a statement obtained from Officer Cain

which relates to a bar being open after hours in 1972, and a conversation he had with City Councilman Delpit, and is unrelated to Kidder.

Exhibit D-7 is a statement of Frank Fuentes, a Baton Rouge patrolman, with reference to a statement allegedly made by Jim Lemming to the effect that it was going to cost him more now that Kidder was Chief of Police, and that he built Kidder's swimming pool with "other" people's money. In response to this, Lemming testified that the swimming pool came up in a conversation when his mother was present and she, in a bragging way about her son, made a statement to the effect that Lemming had built the pool; that he had known Kidder casually for some fifteen years; and that Kidder had never paid him anything and there was no reason to pay him anything. Insofar as the swimming pool was concerned, Lemming testified, and this was verified by responses to interrogatories propounded to Kidder, that Kidder paid for his swimming pool and that it was built by Southern Gunite and that the work was done by his step-father, John Wilbanks. Exhibit D-8 is a statement from Samuel Pruet and relates to an incident when Wingate White was Chief of Police and Kidder was "Night Chief" and supposedly someone told Pruet, other than the individual supposedly involved, that Aaron McGuffery was paying Kidder. Anderson testified that McGuffery was called prior to printing of the story and that he denied paying Kidder for protection.

Exhibit D-9 is a statement from Officer Hilburn, and relates to an incident about not closing bars on advice of Captain Vaccaro in the autumn of 1970 through the spring of 1973. Exhibit D-10 is a statement of Officer Waller, relating to an incident at the Big Four Bar in 1970, which did not relate to Kidder. Exhibit D-11 is an investigation report involving an incident at the Famous Door Bar, which did not relate to Kidder. Exhibit D-12 is a letter of April 30, 1974, transferring and promoting Rufus Stanley Trigg to Lieutenant

Colonel. Exhibit D-13 is a letter dated April 30, 1974, transferring Captain Vaccaro from the patrol division to the detective division. Exhibit D-14 is a statement obtained from Greg Phares, relating to a statement by Captain Vaccaro and when a statement was made about Vaccaro and Dr. Moody supposedly running house of prostitution, at which time Vaccaro corrected the statement and said it was supposed to be he and Kidder who ran the house of prostitution. Vaccaro further stated that he was merely kidding; that it would have been impossible for anyone on the police force to own or operate a house of prostitution and that he had nothing to do with operating or owning a house of prostitution, and that Kidder certainly did not have any such ownership or interest.

Exhibit D-16 is a memorandum of the Baton Rouge Police Department from Major Font to Patrolman Childers transferring him from the intelligence division to traffic. Exhibit D-17 is a letter from Kidder to Childers transferring Childers from the intelligence division to the traffic division. Exhibit D-18 is a letter from Captain Satterwhite to Childers assigning Childers to office duty. Exhibit D-20 is a statement obtained from Wayne Rogillio relating a story about Dr. Moody examining prostitutes, and also a statement supposedly made by Mrs. McDuff to the effect that Fred McDuff gave Kidder an occasional fifth of whiskey. Exhibit D-30 is an interview by Spillers with Tom Myers, a former policeman who said that Kidder was paid off by Saltz the Tailor, who had a bookie shop at 442 Main Street. This was refuted by Saltz, who testified that he had been in the tailoring business since 1941, when he left the Post Office, and he operated a tailor shop at 442 Main Street and has never been involved with gambling or booking. Exhibit D-31 is an interview conducted by Spillers and Crittenden for the Police Department, with Sgt. Boyd, relating a story to the effect that Boyd raided a house of prostitution that allegedly was run by Kidder, but he found no evidence of this allegation. Exhibit D-33 is an interview conducted by Childers with Jim McBride, a brother-in-law of

Howard A. Kidder. Anderson used parts of this statement, although Anderson knew that he (McBride) had had major brain surgery, which affected his memory.

Exhibit D-34 is an interview of Ken Wallace, relating to the payment for certain public records.

At trial, the defendants offered additional evidence concerning the general subject of payoffs and protection, but which had not been included in the articles sued upon. Willie Casing, a long-time patron of Fillup's Tavern, testified that he gambled at Fillup's Tavern from 1954 until about a year before the trial, on a weekly basis. He testified that the house cut the game which was held in the gambling room in a room next to the bar. He had seen Kidder in Fillup's a number of times. He stated that Kidder would go into the office with Rebowe,[2] but he didn't know what transpired between them.

There was more testimony in a similar vein, that tends to weaken the defense rather than strengthen it, because this testimony definitely bolsters the position that Anderson knew that the protection charges were based solely on rumor.

2. **Kidder Assessment:**

The evidence on the question of the "Kidder Assessment" is rather insignificant from both the plaintiff's and the defendants' viewpoint. If anything, it substantiates Kidder's contention that the defendants were out to "get" him. The reader is meant to believe that Acting Chief Kidder took some sinister advantage in obtaining a reduction in his tax assessment. The "Kidder Assessments" publications appeared within a few days of the "Barroom Protection" story. A photograph was shown in the State Times newspaper on July 17, 1974, with the caption "Kidder-Owned Duplex." The caption beneath the photograph reflected that Acting Chief Kidder owned the duplex and that he had caused its assessment to be reduced by the Assessor's Office from $3,300 to $2,300,

resulting in a decrease in taxes from $186.62 to $115.92 annually. The photograph was followed by an article in the State Times on July 17, 1974, with the headline "Kidder Rental Houses Got Cut in Assessment." Then, on July 18, 1974, a photograph appeared in the Morning Advocate with the caption "Policeman's Property." The caption under this photograph pointed out that Kidder owned several parcels of land in Baton Rouge, including his home, assessed as $4,200, and a rental-house, which had its assessment reduced from $2,350 to $1,350.

The testimony of Douglas L. Manship[3] concerning the assessment publications shows that no photograph of any of the homes of other local public officials had ever been published in the newspaper in connection with tax-assessment reductions. William B. McMahon, a reporter for Capital City Press, testified that he undertook to write the articles on his own initiative after discussing Kidder's financial situation with Anderson and Spillers. He stated that he obtained all of the ownership, mortgage, and assessment information from the public records. He checked the other assessments in the neighborhood and found no similar reductions in assessments. McMahon stated that to his knowledge there was nothing untruthful in the article. McMahon then testified that Kidder took exception to the stories, and Kidder's reply was published in the State Times on July 18, 1974, and in the Morning Advocate on July 19, 1974.

The plaintiff called Frank Granger, an employee of the Assessor's Office, who had testified that the reductions in Kidder's assessment was handled through regular channels. Kidder asked for reductions on three or four parcels of land. The Assessor's Office considered the request and reduced two of them. Granger testified that Kidder was treated no differently than any other taxpayer. Kidder testified that his was a routine request for reduction, because the duplex's condition

had deteriorated, as well as the neighborhood in which the other rental property was located.

3. **Harrassment:**

The two articles dealing with "Harrassment" appearing in both newspapers on July 17, 1974, just illustrate the involvement of the newspapers with Officer Childers. There was no basis in fact for the newspapers to level harassment charges against Kidder or the Police Department solely on information furnished by the complaining policeman. The facts show that what Childers was complaining of was his transfer from a plain-clothes officer in the intelligence division to a beat patrolman in traffic division. At the time he wrote the article concerning Childers in the Morning Advocate, Anderson knew of the animosity of Childers toward Kidder; he knew that Childers (and Spillers) were furnishing material to him (Anderson) about investigations which Childers would not even give to the commander of the Police Department, Acting Chief Kidder.

4. **Police Uniforms:**

With regard to the "Police Uniforms" publication, Anderson testified that the article was written by him based on a newscast made by John Spain over WBRZ-TV[4]. Anderson had no independent source for the article, and it was merely a re-write of the newscast, giving credit in its text to WBRZ-TV as the sole source. The article standing alone is of no significance. Taken in conjunction with the later articles attacking Chief Kidder, the article appears to be the forerunner of a series of articles impugning the integrity, morality and honesty of Acting Chief Kidder, since shortly thereafter the "offending statements" were published by the defendants.

The evidence shows that the activities of Kidder in connection with the purchase of the uniforms were not portrayed accurately by the news media. There was nothing unethical

or irregular about his activities. The bids were not handled by Kidder, but through the Baton Rouge Central Purchasing Office, and the bid accepted finally was the only bid properly submitted.

5. **House of Prostitution Involvement:**

The two August 18, 1974, articles charge Kidder, Captain Vaccaro and another police officer, now retired, with having operated a house of prostitution while members of the police force in the late 1950's.

Also, on August 18, 1974, an editorial appeared in the Morning Advocate entitled "MAYOR'S INSISTENCE JUST DOESN'T HOLD," which reads in part as follows:

> "The Morning Advocate today has published another in a series of serious allegations against Acting Chief Kidder. The allegation is that Kidder and two other officers operated a house of prostitution in the late 1950's and possibly longer. This is a serious charge and this newspaper would not and does not make it lightly. The charge is serious enough and well-founded enough to warrant public knowledge and consideration.
>
> "This allegation together with others made in the recent past concerning Kidder's conduct as a police officer make it imperative that Kidder no longer be considered for the post of Chief of Police. The other charges referred to include taking payoffs for protecting certain bar owners from the law. The charges come from trustworthy members of the police department and from witnesses outside the department."

With reference to the "Kidder Prostitution House" charge, Wesley Ringgold, a lifetime resident of the area, stated that there was a house of prostitution at 1201 South 13th Street, which was run by Camille Chase from 1935 until she died some three or four years ago. Ringgold stated that he had

known Kidder since about 1950 and that Kidder had nothing to do with the "house" at Julia and 13th Streets.

Additionally, Ringgold was familiar with Macie Lamotte, who owned the Apex Club and a place on Braddock Street. Ringgold stated that he never, at any time, saw Kidder come or go from the place across the street owned by Camille Chase. In connection with the closing laws and the selling of liquor, Ringgold testified he operated his place as a social club, and that "social clubs" were permitted to operate as a "country club," or other clubs, in order that the black community could have a place to socialize.

The testimony of Macie Lamotte was by written interrogatories, and he stated that Howard Kidder never had any connection, directly or indirectly, with any business operated at the Braddock Street address.

To further refute the allegation that Kidder operated or had an interest in a house of prostitution, Colonel Sliman of the Sheriff's Office testified that he had worked as a partner with Kidder while with the Baton Rouge Police Department in the early 1950's and that he participated in the raid on the house located at 1510 Braddock Street, which raid occurred in November of 1953. Sliman also testified "I've never had any information to the effect that Kidder was connected with a house of prostitution." Also, Malcolm Ballard, who started with the Baton Rouge Police Department in May of 1949, testified that he had known Kidder since they were partners in the detective division during the years 1951-1953, and that he had never picked up any whiskey for Kidder, and that he never knew or heard of Kidder owning, operating, or having any interest in a house of prostitution.

Further, Lt. Col Trigg testified that he started with the Baton Rouge Police Department in 1945, and has known Howard Kidder for more than 25 years. Lt. Col. Trigg testified

that the police department raided Camille Chase's house on several occasions, but that she operated whenever she could get by. Additionally, he stated that Kidder had nothing to do with the "house" at Julia and 13th Streets and that the "house" situated at 1510 Braddock Street behind the Apex Club was raided on one occasion and closed down. Lt. Col. Trigg participated in the raid on the house at 1510 Braddock Street, which was led by Captain Duhon. Lt. Col. Trigg testified positively that Kidder had nothing whatever to do with the opeartion of a house of prostitution.

Captain Vaccaro testified that he started with the Baton Rouge Police Department in 1947, that at the time there were 32 men on the Baton Rouge Police force, and Vaccaro said he knew that there was a house of prostitution at Julia and 13th Streets, operated by Camille Chase, which was raided on a number of occasions by the police. He further said that in 1953 a house of prostitution opened on Braddock Street, run by a man called "Tony". Capt. Vaccaro also testified that he knew Dr. Moody well and that they were friends. Additionally, he said that Tony told him that he had been sending his "girls" to New Orleans for medical check-ups, but would like to have a doctor in Baton Rouge. Vaccaro said that he went to Dr. Moody and personally asked him about examining the "girls" for Tony. Capt. Vaccaro testified that on one occasion he rode with Kidder to Dr. Moody's offiec, and that Kidder advised him (Vaccaro) that Capt. Duhon had instructed him (Kidder) to find out if Dr. Moody was actually examining "girls" for this house. Capt. Vaccaro told Kidder that since he (Vaccaro) knew Dr. Moody, he would talk to him about the situation. Thereafter the house was raided by Capt. Duhon's men. With reference to police activity around these houses, Capt. Vaccaro testified:

"Q. Now, back in those days did detectives occasionally go to those places or check those places?

A. Some of us went to them quite often, businesswise I guess you'd say or trying to get information. In other words, in those days you were only as good as your source of information. In most of these places like that is where you got most of your information from."

Additionally, Capt. Vaccaro testified that in those days you didn't raid one of those houses, unless you were ordered to do so, and when interrogated as to who would set up the raids he answered:

"A. I guess it had to be Chief Duhon. He was the honcho in those days. He didn't tell us too much, you know, we were just patrolmen.

Q. Is that what you and Kidder were in those days?

A. Yes, sir, patrolmen.

Q. Did you and Kidder have anything to do with operating of those houses at all?

A. No, sir.

Q. Was there any way you could operate a house?

A. No way in the City of Baton Rouge especially in those days. Like Chief Duhon, like you say they had more information on those places than we did."

Howard Kidder testified that he had never been in the house at Julia and 13th Streets, but that he had been in the house at 1510 Braddock on two occasions. It was his testimony that he was assigned to work this place by Capt. Duhon, and that he contacted Macie Lamotte about this, that Tony from New Orleans ran the place. Further, Capt. Duhon directed him to find out if Dr. Moody was examining the "girls," and Vaccaro informed him that he would talk to Dr. Moody about the situation. Vaccaro told him that Dr. Moody was

examining the "girls," and that there was no violation of the law, which he (Kidder) reported to Capt. Duhon. Thereafter the house was raided based upon this information.

The publications with reference to Kidder to operating a house of prostitution and protecting barrooms are, beyond any question, false. Anderson knew that Kidder had an administrative job on the inside of the police department from 1962 to 1974, or until he was appointed Acting Chief of Police, and that all the information concerning prostitution activities and protection of barrooms started, and ended, with rumors. In fact, all of the information obtained by Anderson concerning Kidder originated, and remained clothed, in rumor. Although Anderson investigated these rumors for two and one-half months, he found not one positive evidential fact that Kidder was involved in a protection racket, or running a house of prostitution.

Anderson denied that he ever threatened Dr. Moody to get information from him. On the other hand, Dr. Moody testified that Anderson was going to write him up as a co-conspirator if he (Moody) didn't talk to him. Anderson conceded that Dr. Moody never actually told him that Kidder was operating a house of prostitution, and Anderson said **"I don't think he used those words" but that it was only Anderson's interpretation** of Dr. Moody's remarks. Thus, Anderson's credibility was at issue.

Of striking importance is the testimony of Childers, who admitted that he objected to being ordered to terminate an investigation, which he had undertaken on his own behalf for a friend, and he knew that the same matter had been handled by Col. Dumigan; and, further, that he was told that if he wanted to continue the investigation he could go to the District Attorney's Office to file charges. Jane Jarreau testified that she knew Childers by his nickname "Blue", but did not know Kidder, and that Childers said to her that he was going

to "get" Kidder. Although present in court at the trial, former officer Spillers did not testify.

Mayor Dumas testified that he appointed Howard Kidder Acting Chief of Police in April 1974, that he had previously had an investigation made, and that Kidder was "clean." At the time of the appointment, Mayor Dumas gave Kidder complete control of the police department, and thereafter he received a petition from over 250 officers in the police department, Exhibit P-15, praising him on the appointment of Kidder to Chief of Police.

Dr. Moody admitted the following:

> "I had a personal problem, vindictiveness that went way back against Mr. Kidder. It had nothing to do with anything that's been written in the newspapers about him, probably the same thing that I read yesterday that Mr. Paul had a personal problem. He had an opportunity to take it out on Mr. Kidder and looked like he took it out on Mr. Kidder and I did the same thing I suppose. It's a terrible way to do something but I figure I got a personal problem off of my chest and just went about it the wrong way."

Further, Dr. Moody admitted that he had no knowledge that Kidder was involved in prostitution.

James H. Hughes, Managing Editor of the State Times, admitted that perhaps there was some jealousy that existed against Kidder, which could have prompted some of the rumors. He did not personally get involved because "I wasn't convinced one way or the other."

We find that the jury on the record presented here could find the defendant's publication to have been made with reckless disregard of whether the statements therein were false or not. Several factors permit this finding: Under all the circumstances the publications were needlessly false. The only

purpose in publishing these stories was to bring public pressure to bear on the Mayor to "get rid" of Acting Chief Kidder. The stories were given the most controversial view possible, and were deliberately slanted to portray Acting Chief Kidder as totally unfit to be a police officer.

SPECIFICATIONS OF ERRORS NOS. 3 AND 4

These assignments of error can be dealt with together since they both are concerned with the trial court's refusal to grant a directed verdict at the end of the plaintiff's case and again at the close of the evidence. The defendants moved for the directed verdict on the ground that the plaintiff had failed to produce sufficient evidence to justify a jury finding of "constitutional malice." The trial court refused to consider the motions for directed verdict on the ground that there was no applicable Louisiana procedure for such a motion.

We agree with the trial court that our Code of Civil Procedure does not provide for a directed verdict. There is no need of a motion for directed verdict in this state. The lack of necessity for such a procedural device is clearly explained in the Preliminary Statement, Chapter 7, Book 2, Title 5, Jury Trial, as follows: "(T)here is no need for any elaborate system of controls over the irresponsibilities of the jury, since the later's finding of fact or award of damages may be set aside if the appellate court concludes that these are not supported by a preponderance of the evidence (or, in cases of this nature, clear and convincing evidence.) For these reasons, this Code does not embody the excellent jury controls to be found in the Federal Rules of Civil Procedure, and in the procedural systems of other states based thereon. These controls are badly needed in the jurisdictions which have adopted them. They would serve no particularly useful purpose in the civil procedure of Louisiana." See *Joseph v. Tri Parish Flying Service, Inc.*, 201 So.2d 321 (La. App. 3 Cir. 1967).

Although the appellants concede that this States does not have the procedural device known as the directed verdict, *State v. Placid Oil Company*, 274 So.2d 402 (La. App. 1 Cir. 1972) amended in part, 300 So.2d 154 (La. 1974), they urge that the failure to direct a verdict in their favor was in error, due to the fact that there was no evidence of "constitutional malice" in this case.

Again, the answer on this point is found in the evidence and the reasonable inferences to be drawn therefrom. From the evidence presented by the plaintiff, particularly with regard to the abrupt change, from praise to condemnation, of Acting Chief Kidder by the press, to the involvement of the reporter with the two former policemen, and the testimony of witnesses tending to show that from his investigation the reporter had serious doubt as to the truth of the publications, the trier of fact could reasonably conclude that the publications were published with "actual malice."

Clearly, there was sufficient evidence to let the case go to the jury. There was all the more reason to let the case go to the jury at the close of the evidence, for there was a question of credibility of the witnesses in addition to the evidence of the press departing from objective reporting of the news. Evidence of such departure can be considered by the jury in determining whether there was a "reckless disregard for the truth." See *Curtis Publishing Company v. Butts, supra.*

We must, and do, view this case in the light of *New York Times.* Since *New York Times,* one legal principle, above all others, emerges from a study of the defamation cases; and that is that each case must be viewed by the reviewing court on its own peculiar facts, with a strong inclination toward the protection of First Amendment rights. At some point, which may not be easily defined, clear and convincing evidence will show that the precious barrier has been

breached, and a jury must be permitted to find "actual malice" on the part of the publisher, unless we were to adopt the Black-Douglas approach that the First Amendment grants an absolute defense for the news media to all defamation actions, which we see no reason to do in the absence of a clear expression of "absolutism" from the Supreme Court.

As stated above, in order to establish "actual malice" under the *New York Times* standard, the plaintiff must show that the defendants had knowledge of falsity of the statements, or a reckless disregard for the truth. If the plaintiff can not show the defendants knew that the statements were false, he must show reckless disregard for the truth. "(R)eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson, supra.*

Keeping in mind that evidence of "actual malice" must be "clear and convincing," more than "preponderance", less than "beyond a reasonable doubt," we now consider, as we should in First Amendment cases, to make an independent examination of the record. The articles and editorials were not "hot news." See *Curtis Publishing Company v. Butts, supra.* First, the newspaper published an editorial of praise. Shortly thereafter, primarily because Anderson was supporting the ex-policemen, Spillers and Childers, in an effort to get Kidder out as Chief, the newspapers published a series of articles and editorials condemning Kidder. When Anderson published the articles charging Kidder with running a house of prostitution and receiving payoffs for barroom protection, he knew that they were based on unsubstantiated rumors. When a lead produced information that Kidder was not connected with prostitution or barroom protection, Anderson chose to ignore that source and to rely on hearsay or dubious

information furnished him by the two former policemen. This is the "calculated falsehood" condemned in *Garrison, supra.* Moreover, during all of this time the defendants were seeking advice of counsel and checking with various managing editors on the newspaper staffs as to how much further Anderson would be allowed to go with the charges against Kidder. To have directed a verdict under such circumstances would not have measured up to, but would have fallen beneath, the *New York Times* standard, and would have constituted reversible error on the part of the trial judge.

SPECIFICATION OF ERROR NO. 5

This assignment of error was made because the trial court refused to allow testimony by Officer Reeves relative to the so-called "Miguez" tapes.

When he testified, Kidder did not deny that many years ago he had had a telephone conversation with a gambler named Miguez. Supposedly to impeach Kidder, the defendants offered the testimony of Officer Reeves to contradict what Kidder had said the conversation was about. Plaintiff's counsel objected on the ground that the wire-tap was illegal and, consequently, any testimony relating to the tape was inadmissible. The lower court sustained the objection.

> The defendants then made an offer of proof, as follows:
> ". . . at the time in question about which Chief Reeves started to testify, that he and his partner, Tommy Cole, picked up a wire tap on one Miguez' place. Among the calls received and while they were there in person and listening to it on head phones was a call to the police station to then I believe Captain Howard Kidder, in which the caller said that he needed to see him and arrangements were made to meet somewhere away from the police station. Upon hearing this particular call they would be expected to testify that they thought they recognized the same voice as that which answered in response

> to the call to Captain Kidder, that they replayed the tape of earlier calls and established to their then satisfaction, although not beyond all doubt, that a number of earlier calls had been made to Captain Kidder, and that in these earlier calls arrangements were being discussed with regard to how to set up a gambling operation in the Capital House Hotel. That this was reported to then Sheriff Bryan Clemmons and they are not sure what happened to the tapes or what subsequent action if any was taken thereon. This is the testimony in general that we expected to elicit from these two witnesses. And we'd like to put that in under an offer of proof."

It is difficult to see how such testimony could be considered as impeaching evidence. It should be noted that Reeves was to be interrogated about the contents of a telephone call from Miguez to Kidder which took place in the 1950's. The tape of the telephone conversation was not available, and nothing allegedly contained therein supplied any information on which the press relied in writing or publishing the articles in question in this lawsuit. The testimony of Reeves pertaining to the taped telephone conversation has no probative value. The only possible reason to offer such testimony was to show that Kidder lied about his conversation with Miguez, but Kidder admitted the material facts contained in the offer of proof. We also agree with the trial court that the fruits of an illegal wire tap are inadmissible for any purpose in the trial of a case in this state.

We further find that 18 USCA, section 2515, prohibits the use of the proposed evidence for any purpose, including impeachment. See also 47 USCA, Section 605. However, even if there were no federal statutory prohibition, the evidence was inadmissible. Our procedural rules require identification of the tape as a condition precedent to its admissibility or to its contents' admissibility in evidence. The defendants made little or no effort to identify the voices on the tape or to

authenticate the tape in a proper manner. In the complete absence of such authentication of the tape, the objection to its introduction in evidence was well taken, and the trial judge properly ruled it inadmissible. See *United States Fidelity Co. v. Duet*, 177 So.2d 302 (La. App. 1 Cir. 1965); 29 Am.Jur.2d sec. 381, p. 432.

Even if we were to hold the evidence admissible, this would not affect the decision in the instant case. It has long been the rule that unless a substantial right of the party against whom the ruling on the evidence was made is affected. such ruling will be considered harmless error and not a ground for reversal.

SPECIFICATION OF ERROR NO. 6

The defendants complain that the trial court erred in not giving sufficient instructions to the jury concerning the policy reason for the legal protection afforded by the First Amendment, and label the judge's charges as "sterile."

It would be difficult to conceive of instructions more feracious, more pertinent, more concisely stated, more thorough and yet presented in understandable language, than those given by Judge Ponder in this case. The trial judge gave definite charges pertaining to the federal rules applicable in defamation actions, both at the beginning and also at the close of the case.

We find that the trial judge fully and properly instructed the jury herein as the procedural law directs. All of the applicable laws was succinctly and fully explained to the jury. The trial judge at no time indicated any partiality to either side. He at no time indicated his feelings about any fact, stressing that it was the function of the jury to find the facts. More specifically, the trial judge carefully informed the jury that the plaintiff was admittedly a public official suing a news-

paper reporter and the press for defamation, and as such he had the burden of proving "actual malice" by "clear and convincing evidence." He clearly explained the meaning of "actual malice" and "clear and convincing evidence" in the light of the applicable federal jurisprudence, particularly using the language of the *New York Times* case, which is the definitive opinion on the question of defamation involving public officials.

There was no error in the trial judge's instructions on the constitutional aspects of the case. He properly ruled that the standard enunciated in *New York Times Company v. Sullivan, supra*, was applicable. He charged the jury, in substance, that in order to find for the plaintiff they must find that the clear and convincing evidence shows that these particular defendants published defamatory falsehoods about the plaintiff with "actual malice." The trial judge defined the term "actual malice" and then defined "reckless disregard."

> "The cases interpreting the First Amendment of the United States Constitution require that if a plaintiff is a public official he must prove that the false statement was made with actual malice, that is with knowledge that it was false or with reckless disregard for whether it was false or not.
>
> "Reckless disregard in cases of this kind has been interpreted to mean that the defendant need not have investigated before publishing and he must have in fact entertained serious doubts about the truth of his publication at the time he published or as one case phrases it, with a high degree of awareness or probable falsity."

See *Garrison v. State of Louisiana, supra.*

Not only did the judge charge the jury at the close of the evidence and arguments, but he instructed the jury at the very outset of the trial, by agreement of counsel, with

regard to "actual malice" and the burden of proof, and the other necessary instructions so that the jury could better understand the evidence which was about to be presented.

The judge specifically instructed the jury:

> "In such cases, even though a publication be defamatory, the public official can not recover unless he proves that the defamatory statement was made with actual malice. That is with knowledge that it was false or with reckless disregard of whether it was false or not. In these cases the evidence presented must show with convincing clarity actual malice on the part of the publisher. I will define some of these terms later in the course of the trial in presenting the Court's charge of law to the jury."

In his charge the trial judge gave the general defamation law, and then specifically informed the jury that because the plaintiff admitted that he, as Acting Chief of Police, was a public official, the case was subject to the federal rules with regard to proof. The judge explained that the evidence must show with convincing clarity that all of the elements of defamation had been proved.

The judge further charged the jury that if they found the defendants liable they could only award reasonable damages of a compensatory nature; he further instructed them that they could not award punitive and speculative damages.

Although the record does not contain the requested instructions which were denied by the trial judge, the appellants have set them out in their brief. We find that the applicable law contained in the requested instructions was adequately covered in the general charges of the trial judge. It is well settled that a trial judge does not commit reversible error in refusing to give special charges where such charges are in effect included in the judge's general charges. *Haynes v.*

Baton Rouge General Hospital, 298 So.2d 149 (La. App. 1 Cir. 1974), writ den. 302 So.2d 33.

The Supreme Court found, in *Curtis Publishing Company v. Butts, supra,* that the jury was properly instructed concerning the factors to consider to hold that the defendant acted in "reckless disregard", and remarked:

> "The impact of a jury instruction 'is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied.'
>
> * * *
>
> "This jury finding was found to be supported by the evidence by the trial judge and the majority of the Fifth Circuit."

The Court continued:

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. . . ."

Despite our finding that the trial judge committed no manifest error in his rulings or in his charges to the jury, we have made an independent examination of the entire record in the instant case, and we are convinced that the jury verdict and the implementing judgment do not constitute a forbidden intrusion on the field of free expression. See *New York Times v. Sullivan, supra.* We have carefully reviewed all of the evidence, as we said before, and we find that the constitutional principles of *New York Times* and its progeny have been constitutionally applied. There has been no infringement upon, nor impairment of, the free exercise of First Amendment freedoms. See *Curtis Publishing Co. v. Butts, supra.*

SPECIFICATION OF ERROR NO. 7

Alternatively, the appellants' argue that the jury's award of damages was excessive.

In considering the jury award in the instant case, we must consider it in light of the recent Louisiana Supreme Couurt decision of *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976) and in light of the "chilling effect" which the threat of potentially large defamation verdicts poses to the exercise of First Amendment rights.

Coco reminds us that, as an intermediate appellate court, we are not to disturb an award made by a trier of fact unless the record clearly reveals that the trier of facts abused its discretion in making its award.

The *Coco* court stated:

> "Only after making the finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. Bitoun v. Landry (302 So.2d 278, La. 1974); Spillers v. Montgomery Ward & Company, Inc. (294 So.2d 803, La. 1974). It is never appropriate for a Court of Appeal, having found that the trial court abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence."

This Court agrees with the defendants' contention that the jury award of $400,000.00 actual damages is excessive. We are persuaded that an award in such amount would have a "chilling effect" upon the legitimate exercise of the rights of freedom of the press and would lead to undesirable self-censorship, the prevention of which has been the object and purupose of the United States Supreme Court since *New York Times Company v. Sullivan, supra.*

In viewing all of the evidence, we find that the plaintiff has proved $100,000.00 in actual or compensatory damages.

Under our law, in a defamation action a plaintiff is entitled to have such elements as mental anguish, humiliation and embarrassment considered by the jury in arriving at an award for compensatory damages. See *Sas Jaworsky v. Padfield*, 211 So.2d 122 (La.App. 3 Cir. 1968); *Chretien v. F. W. Woolworth Company*, 160 So.2d 854 (La.App. 4 Cir. 1964), writ ref. 246 La. 75, 163 So.2d 356.

In accordance with the dictates of *Coco*, we find that the record clearly supports the findings that the trier of fact abused its much discretion in making an award of $400,000.00; consequently, we must lower the award to the sum of $100,000.00, the highest point which is reasonably within the range of the discretion of the trier of fact. In fixing the award, we have reviewed prior reported decisions but have placed no particular emphasis on the awards in those decisions, inasmuch as it is hardly discernible by gleaning the facts from them that we should fix a like quantum judgment in the instant case, none of them being fully apposite. We have, of course, taken into consideration, in light of our ever-changing society, various factors: the plaintiff has had to expend much time and expense in connection with this litigation; he has been and will be adversely affected in his chosen employment as a law enforcement officer; he has been severly humiliated and embarrassed, and has suffered considerable mental distress by these defamatory publications; and, also, the plaintiff's reputation has been greatly injured by these defamatory publications. We have also heeded the insulating effect of *New York Times* in order not to approve of an award which might constitute a threat to the defendants' legitimate exercise of their First Amendment rights.

We find, for the stated reasons, that an award of $100,000.00 falls reasonable within the range of discretion

which is vested in the trier of fact, and yet will not threaten or diminish freedom of the press. Thus, the judgment, being excessive under the appropriate standards, is amended to reduce the award to the sum of $100,000.00, and as amended the judgment is affirmed. Costs shall be paid by the defendants-appellants.

AMENDED AND AFFIRMED.

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1. The United States Supreme Court does not even intimate in **New York Times** that it is imposing that burden of proof "by convincing clarity" on a defamed public-official-plaintiff in the pre-trial stage. In fact, the court rejected the absolute-immunity doctrine continuously espoused by Justices Black and Douglas in all First Amendment situations. To require a plaintiff to convincingly prove a highly subjective factor in the pre-trial stage is to surreptitiously invoke the absolute immunity doctrine which has been repudiated. We do not feel that this Court, in the matter before us, should be in the vanguard in advocating such an insupportable jurisprudential stance.
2. He was the owner of the tavern.
3. He is named on the masthead as the publisher of the newspapers.
4. The television station is also a Manship enterprise.

HOWARD A. KIDDER

VERSUS

**BOB ANDERSON AND
CAPITAL CITY PRESS, INC.**

**STATE OF LOUISIANA
COURT OF APPEAL**

FIRST CIRCUIT

NO. 11205

**ON APPEAL FROM THE NINETEENTH JUDICIAL
DISTRICT COURT IN AND FOR
THE PARISH OF EAST BATON ROUGE, LOUISIANA,
HONORABLE ELVEN E. JONDER, JUDGE PRESIDING.**

LOTTINGER, JUDGE.

DISSENTING AND CONCURRING OPINION

I concur in the majority's conclusion that the jury award of $400,000.00 was excessive, and should be reduced to $100,000.00, however, I cannot agree with those statements contained therein that a $400,000.00 award would have a "'chilling effect' upon the legitimate exercise of the rights of freedom of the press and would lead to undersirable self-censorship, * * *."

I respectfully dissent, however, from an affirmance of the Trial Court judgment as to the question of liability. This suit should have been disposed of in favor of the defendants on their motions for summary judgment.

Defendants filed two partial motions for summary judgment, the first covering an article appearing in the Baton

Rouge Sunday Advocate on July 14, 1974, and the second covering articles appearing on June 12, July 16, July 17 (two articles), July 18, and August 8 (two articles), all in 1974.

In an affidavit of defendant, Bob Anderson, attached to the first motion for partial summary judgment, defendants analyzed each sentence of the July 14, 1974, article, setting forth from whom the information was obtained, and that the defendants had no reasons to disbelieve the information contained therein. There were some twenty-three individuals mentioned in the affidavit, some by signed statements, and others by oral statements, which in some cases were later reduced to affidavits. Copies of the affidavits and signed statements were attached to the motion.

The plaintiff in opposition to this partial motion for summary judgment filed his lone affidavit. This affidavit contained a complete quote of a complimentary editorial appearing on May 2, 1974, in the State Times newspaper, a sister paper of the Morning Advocate. It further set forth that even after the publication of this complimentary editorial, the defendants commenced an investigation of the plaintiff, and obtained statements from individuals with full knowledge that these individuals were out to "get Kidder". The opposition affidavit further sets out that the statements obtained contained nothing more than hearsay, that the defendants did not make direct contact with the individuals allegedly involved so as to verify the facts contained in the statements, that the facts contained in the statements were false and untrue, that the defendants knew or had reason to know that they were false, that the defendants or representatives of the defendants threatened to expose certain individuals if they did not give statements concerning the plaintiff, and that after responding to certain interrogatories the defendants continued to make inquiry of certain individuals, having known of them prior to the publication of the July 14 article, and having failed to contact them prior thereto. In concluding the affi-

davit, the plaintiff alleges that the defendants knew of the plaintiff's qualifications and background as a law enforcement officer and that for reasons best known to the defendants they in bad faith attempted to obtain information from disgruntled individuals who could only furnish hearsay testimony so as to defame the plaintiff. In answer to certain interrogatories propounded by the defendants to the plaintiff, the plaintiff names various individuals that he intended to call as witnesses on his behalf, and in particular those he would call to prove malice as well as three individuals who purportedly heard plaintiff make the remark "I'll get Kidder".

In support of its second motion for partial summary judgment the defendants filed affidavits as to each article setting forth the particulars. In addition to affidavits by those individuals who prepared the articles, there were also attached statements by individuals who gave information to the reporter involved.

In opposition to this motion for a partial summary judgment, the plaintiff filed an affidavit of one Fred King who set forth very basically that he knew the defendant Bob Anderson as well as some of his informants, that he joined in their effort to obtain information against Howard Kidder and actually made a trip to Biloxi, Mississippi to inquire into the alleged ownership of a boat, all to no avail. He further stated in his affidavit that Anderson told several individuals in his presence that if they kept coming up with information on the plaintiff that he could keep his name in the newspaper, but that Fred King could never find anything against Howard Kidder that could be verified and so informed those with whom he was participating, and that in spite of the fact that none of the information of the rumors could be verified the defendant continued in his efforts to discredit Kidder. In addition to the affidavit of Fred King, the plaintiff also filed an affidavit of Mayor Woodrow W. Dumas, of Baton Rouge. Mayor Dumas' affidavit sets forth that he informed certain

reporters and employees of the defendant that there was nothing to the rumors concerning Howard Kidder. The plaintiff also filed his own affidavit, which simply disputed facts contained in the articles. It further stated that he had never been questioned by the defendants as to any of the articles nor did they make any effort to verify or discuss with him the facts contained theerin.

The United States Supreme Court in the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270, 279, 84 S.Ct. 710 (1964) said:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117. '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v. California, 314 U.S. 252, 270 62 S.Ct. 190, 197, 86 L.Ed. 192, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N. A. A. C. P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v. Associated Press, 52 F.Supp. 362, 372 (D.C.S.D.N.Y.

1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, 47 S.Ct. 641, 648, 71 L.Ed. 1095, gave the principle its classic formulation:

> 'Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

"Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

* * * * *

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The Supreme Court further concluded that the "constitutional standard demands" that "actual malice" be proved with convincing clarity.

Therefore, the issue in this case is not the truth or falsity of the statements published, but rather, whether the statements were published with actual malice, that is, with knowledge that they were false or with reckless disregard of whether were false or not. It is not the negligent publication that we are here concerned with but rather the publication with the reckless disregard to the truth. *Garrison v. State of Louisiana*, 379 U.S. 64 (1964). Reckless conduct vis-a-vis negligence in the publication of statements concerning a public official is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. The mere failure to investigate does not in itself establish bad faith. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

These three keystone cases from the United States Supreme Court set forth the standard of conduct that the defendant must be found in violation of before he can be found at fault or liable for the publication. Unless the plaintiff can show with convincing clarity that the defendant has breached this rule of conduct, he cannot recover.

Unquestionably, summary judgment is a proper procedure for affording the constitutional protection of the First and Fourteenth Amendments in a proper case. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970) and *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969).

Under what criteria must a judge decide a motion for summary judgment in a defamation suit by a public official? Does he use the traditional criteria applicable normally to

all cases, or do the First and Fourteenth Amendments mandate a different criteria?

In *Washington Post Co. v. Keogh*, 365 F.2d 965, 967 (D.C. Cir. 1966), Judge Wright in speaking for the Court said:

> "A motion for summary judgment should be granted where it is shown that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. In deciding whether a genuine issue of fact is raised in any case, a number of general considerations are relevant. First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence. See Pierce v. Ford Motor Co., 4 Cir. 190 F.2d 910, cert. denied, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). This need for care has given rise to valid generalizations that summary judgment must be denied when there is 'doubt' whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind.
>
> "These generalizations do not, however, relieve courts of their responsibility to decide whether a genuine issue of fact exists. That doubt concerning the issue should be resolved against the movant may assist courts in disposing of troubling cases after deliberation, but it provides no assistance in the deliberative process itself. That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such

> litigation will be used to harass or to coerce a settlement. Asbill & Snell, Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented, 51 MICH. L.REV. 1143, 1144 (1953).
>
> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of law suits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for the self-censorship affecting the whole public is 'hardly less virulent for being privately administred.' Smith v. People of State of California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959)."

Further, in *Thompson v. Evening Star Newspaper Co.*,

394 F.2d 774, 776 (D.C. Cir. 1968) the court said:

> "Since the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues, a public figure cannot resist a newspaper's motion for summary judgment under

> Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred."

And again in *United Medical Laboratories v. Columbia Broadcasting System*, 404 F.2d 706, 712 (9th Cir. 1969) it was said:

> "In order to recover, United Labs would have to prove with 'convincing clarity' that the statements of the publications, if they could be defamatory of it, were made with knowledge that they were false in their alleged implications against it or were made with reckless disregard of whether they were false or not. And in order to be entitled to proceed in this respect, United Labs could be required to show, on proper challenge such as by the motion and showing for summary disposition here, that it had sufficient probative substance to be able litigably to give rise to an issue of fact on whether such malice actually existed or not."

And as the court said in *Ragano v. Times, Inc.*, 302 F.Supp 1005, 1010 (M.D. Fla. 1969) in discussing the plaintiff's burden where the defendant has moved for summary judgment:

> "Perhaps in no other area of civil litigation is the burden so ominous as in the law of defamation. To survive summary judgment proceedings it is necessary that he offer some evidence upon which a jury could find convincing clarity of actual malice or reckless disregard. The decisions require that he come forward with evidence of the defendant's state of mind; in effect, he must prove a negative. There must be '* * * sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts.' [*St. Amant v. Thompson*, supra]."

It is not sufficient to withstand a motion for summary judgment that the moving party's motion for summary judgment merely alleges malice, and courts are not persuaded "that the fact that the newspaper reporter did not seek out the plaintiffs personally to get their version of the dispute would support an inference of actual malice on the part of the defendant." *Hurley v. Northwest Publications, Inc.*, 273 F.Supp. 967 (D.Minn. 1967).

It is well stated in *F & J Enterprises, Inc. v. Columbia Broadcasting System, Inc.*, 373 F.Supp. 292, 297 (N.O. Ohio 1974) that:

> "Although courts are loathe to grant a motion for summary judgment, particularly 'of a case of any complexity,' S. J. Groves & Sons v. Ohio Turnpike Comm'n, 315 F.2d 235, 237 (6th Cir. 1963), cert. denied, 375 U.S. 824, 84 S.Ct. 65, 11 L.Ed.2d 57; Hart v. Johnston, 389 F.2d 239 (6th Cir. 1968), and generally construe pleadings, affidavits and the like in a light most favorable to the opposing party, the courts have often required a more rigid compliance with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure when the action involves the defendant's First Amendment Rights since prolonged litigation might have a 'chilling effect' on the exercise of such rights. Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir. 1969), cert. denied, 395 U.S. 922, 89 S.Ct. 1776 23 L.Ed.2d 239 (1969).

"Consequently, the courts have imposed a heavy burden upon the plaintiff seeking recovery in a defamation action involving the First Amendment rights:

> 'Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. Plaintiff has been purposely given the heavy burden of proving actual malice . . . When it has been established, as it has been in this case, that he cannot meet it, the First Amendment makes it incumbent upon the Court to grant defendant's motion for summary judgment.' Cerrito v. Time, Inc., 302 F.Supp. 1071,

1075-1076 (N.D.Cal. 1969), aff'd per curiam, 449 F.2d 306 (9th Cir. 1969).

"In United Medical Laboratories v. Columbia Broadcasting System, *supra*, 404 F.2d at 713, 712, with respect to 'primary question on the federal rule and standard . . . of actual malice' the Ninth Circuit held that a plaintiff 'could be required to show, on a proper challenge such as by the motion and showing for summary disposition here, that it had sufficient probative substance to be able litigably to give rise to an issue of fact on whether such malice actually exister or not'."

The court then concluded that in light of this strict federal standard as set forth in *New York Times* and the most recent decisions the plaintiff is required to prove with convincing clarity, when confronted with a motion for summary judgment and supporting documents, the existence of elements with sufficient probative substance to provide a basis for a finding that a defendant had knowledge of falsehood or serious doubts as to the truth of the alleged defamatory statements.

I am convinced after a close and thorough reading of the federal cases, from *New York Times* on, that the burden placed upon a plaintiff in defeating a motion for summary judgment is a most severe and difficult challenge to meet, though not impossible. He cannot merely allege malice or reckless disregard, nor hope to prove malice by questioning the defendant or defendant's witnesses. Where in the ordinary type of case he could be successful in defeating the motion by only putting forth a minimum of evidence, here he confronts the guarantees of the First and Fourteenth Amendments, and thus stands the risk of the motion being successful if he cannot at this stage of the proceedings show that he can produce sufficient evidence on the trial that will prove with "convincing clarity" the defendant's malice. Stated another way, I am convinced that the single thread that is woven

throughout this entire fabric is that in order for plaintiff to be successful on the threshold issue of summary judgment, he must come forth with strong evidence, convincingly clear evidence, that the defendant either knew the statements published were false or that he had reckless disregard of whether they were false or not. Otherwise, if plaintiff is allowed to escape summary judgment by simply a minimum showing, he has thus effectively invoked the "chilling effect" of trial doctrine.

The Louisiana and Federal Summary Judgment Rules are basically the same. See LSA-C.C.P. Arts. 966-967 and Rule 56, Federal Rules of Civil Procedure. The Louisiana Code of Civil Procedure can require nothing less from the plaintiff in cases of this nature at the summary judgment stage of the proceedings than have the federal courts under the federal rules because of the federal constitutional questions involved.

The majority contends that the affidavits filed by defendants in support of their moitons for summary judgment are of no moment because they were not based on personal knowledge of the affiants as required by LSA-C.C.P. 967. Again the issue is not the truth or falsity of the statements published, but rather, whether the statements were published with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not. Though the information appearing in the affidavits and statements by the various informants is the rankest of hearsay, they would be admissible on the merits as being offered not for the truth of the information contained therein, but simply being offered for the fact that the defendants were told this information by these informants, and this goes to the issue of malice.

Each defamation suit by a public official on the threshhold issue of summary judgment must be decided on its own

facts. The earlier case by this court of *Batson v. Time, Inc.*, 298 So.2d 100 (La. App. 1st Cir. 1974), *writ denied* 299 So.2d 803 (1974), with notation "judgment not final" is only dispositive of the issue as to whether the plaintiff in that case set forth sufficient evidence in opposition to the motion for summary judgment.

After reviewing all of the interrogatories, affidavits, and any other evidence as well as the inferences reasonable drawn from them in a light most favorable to the plaintiff, I am convinced that the plaintiff has not made a sufficient showing in opposition to the motion for summary judgment of his ability to prove malice on the part of the defendants with convincing clarity.

It is, therefore, for these reasons that I believe the Trial Judge was in error in refusing to grant both motions for partial summary judgments and my esteemed brethren of the majority fell into error in affirming the action of the Trial Court.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 59,988

HOWARD A. KIDDER
Plaintiff-Appellee-Respondent

versus

BOB ANDERSON and
CAPITAL CITY PRESS, INC.
Defendants-Appellants-Relators

Writ of Review to the Court of Appeal,
First Circuit, East Baton Rouge Parish.

* * *

TATE, Justice.

The plaintiff Kidder sues a newspaper reporter (Anderson), and his employer-publisher to recover damages resulting from the publication of several newspaper articles and editorials. Kidder was Acting Chief of Police of Baton Rouge. He alleges damages caused him by defamatory articles depicting him, a law enforcement officer, as accepting payoffs and favors from barroom proprietors and gamblers, as interested in the operation of a house of prostitution in the 1950's, and as using the influence of his office for personal gain.

The trial jury awarded Kidder damages of $400,000. Reducing the award to $100,000, the court of appeal affirmed judgment in favor of Kidder. 345 So.2d 922 (La. App. 1st Cir. 1977).

On application of the defendants, we granted certiorari. 346 So.2d 1271 (1977), because we entertained doubt that the intermediate court had correctly applied the constitutional

rule regulating recovery of damages by a public official claiming he had been defamed by criticism:

A public official may not recover damages for a defamatory statement, even if false, relating to his official conduct "unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Company v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726 (1964). Moreover, the public official plaintiff must meet this burden not merely by a preponderance of the evidence, but with "clear and convincing proof." Gertz v. Robert Welch, Inc., 418 U.S. 323, 243, 94 S.Ct. 2997, 3008 (1974). See also New York Times Company v. Sullivan, cited above, 376 U.S. 285-86, 84 S.Ct. 729.

(1)

As stated in New York Times Company v. Sullivan, cited above, 376 U.S. 279, 84 S.Ct. 725, the reason for the rule is that otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'."

That opinion also noted, 376 U.S. 269, 84 S.Ct. 720, that the constitutional safeguard for freedom of expression " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' " and that " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system'."

As we ourselves recently reiterated in Mashburn v. Collin, —— So.2d —— (La. 1977) (Docket No. 59,466; December 12, 1977): " 'The stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors'."

(2)

In upholding an award, the court of appeal, with one judge dissenting, concluded: (a) that, reviewing the evidence (**after** trial on the merits), it was unable to find error in the apparent jury determination that the charges were false in fact;[1] and (b) that, since the information had been gathered from disgruntled police officers and persons whom the jury apparently found to be unreliable, the jury could reject good faith in publication and could find the malice test met, because "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of the reports." St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326 (1968).

(3)

The error in the intermediate majority's reasoning is that the credibility of the publisher's informants must be

Footnote 1:

Although we do not intend to make a detailed review of the evidence, we note that the court of appeal wrongly attributed to Dr. Moody an expression of vindictiveness towards Mr. Kidder, 345 So.2d 937, whereas the quote from Tr. 1577 (stenographic page 159), (is actually part of the testimony of Kidder's brother-in-law following stenographic page 158, Tr. 1541), James McBride. The latter here attempts to explain a basis for very damaging information he had furnished to Anderson and a police officer assisting Anderson in his investigation. No reason whatsoever is shown for doubting the reliability of the information furnished by Dr. Moody.

judged, not on the basis of an evaluation of sworn testimony at a trial (after full opportunity to rebut accusations), but rather on the basis of information available to the reporter at the time of publication. St. Amant v. Thompson, cited above.

That police officers were disgruntled and antagonistic to their proposed chief is not necessarily an indication of their unreliability as informants. In fact, some of these very police officers now attacked as unreliable have often appeared as witnesses in criminal prosecutions by the state, with their credibility vouched for by officers of the state.

In St. Amant v. Thompson, cited above, the United States Supreme Court reversed this court's affirmance of a judgment for damages in a public official's defamation action. As in that case, the bias of the informant is not persuasive in determining malice, where the information has been obtained from an informant in a position to know the information published and where there is no clear and convincing evidence that the person publishing the information had any personal knowledge unequivocally indicating the unreliability of his informant.

With regard to the reliability of the information conveyed by these police officers, the criterion is not whether they were motivated by selfish reasons to furnish the derogatory information. Rather, it is whether or not they were in a position to obtain the information furnished by them, and whether or not the report they conveyed was so inherently improbable as to create indisputable doubt as to its authenticity. St. Amant v. Thompson, cited above.

Again, having attacked the police officer information as suspect on the ground of bias, the plaintiff also suggests that the newspaper reporter improperly relied upon information conveyed to him (and corroborated by written statements obtained from them) from gamblers and barmaids as to payoffs or bribes.

We were unable to accept the inference that, therefore, the reporter should not have relied upon information as to bribery conveyed by them. Just as the state is rarely in a position to rely upon the testimony of church wardens and Sunday-school teachers to prove criminally corrupt activities by public officials, so newspaper investigation of reports of corruption must often obtain first-hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations.

On the merits, substantial evidence, of police officers and others, indicates factual circumstances which might give rise to an inference of impropriety on the part of Kidder during his long police career, despite the recognition of his merit by his steady advance to the highest ranks of the police force. Nevertheless, we find no reason to reject the jury's apparent finding that, despite these indications of impropriety (indications perhaps unavoidably arising from police association, in order to obtain information of law-violation, with persons on the fringes of crime), Chief Kidder was a reliable police officer throughout his career, with plausible explanations and denials for the various incidents of alleged impropriety involved.

(4)

The issue, however, is not the ultimate falsehood of the defamatory statements. It is, rather, whether a newspaper reporter and publisher uttered them with actual malice, i.e., with reckless disregard of whether they were false or not.

In each instance, the published statements were based upon interviews, generally corroborated by written statements taken at the time, with individuals in an apparent position to know of the factual accuracy of the information conveyed.

The record discloses no reason for Anderson or his pub-

lisher to doubt the trustworthiness of the information received by them and subsequently published.

We do not find persuasive the contention that malice is shown because the mayor appointing Kidder, a very able, honest, and well-respected official, advised the local media that he had investigated rumors concerning Kidder prior to this appointment and, on the basis of his investigation, found no basis for the charges. The mayor's information, based on his investigation, was essentially irrelevant to the present query, in the absence of any indication that it gave the defendants substantial reason to doubt the authenticity of information gathered by their own different and possibly more detailed investigation, nor the veracity of the sources (including the police officers) relied upon by them.

The endorsement of an appointee by his superior cannot be said to constitute reason to silence the publication of charges based on sources whom the publisher has no other reason to disbelieve. To accept the plaintiff's position might well be to immunize from public discussion the prior conduct of persons whom highly placed officials, upon appointing them, endorse as without blemish based upon the appointing official's investigation, however thorough he deems it.

Accordingly, we find that the plaintiff Kidder, a public official, has not proved by clear and convincing evidence that the defamatory statements written and published by the defendants, although false, were done so with actual malice — that is, either with actual knowledge of the falsity of the reports published, or else with reckless disregard of whether or not they were false. Having failed to meet this constitutional requirement for recovery of defamation damages by a public official, the plaintiff Kidder's suit must be dismissed.

(5)

Additionally, since both parties request us to rule upon

the issue, we find that the motion for summary judgment was improperly denied.

In support of the motion, the defendants made essentially the same showing as was outlined above: that each piece of information was obtained, usually in writing before publication, from police officers and others with first-hand knowledge in a position to report the information given.

As we recently stated in Mashburn v. Collin, cited above at —— So.2d ——: "In cases affecting the exercise of First Amendment liberties, proper summary judgment procedure is essential . . . Summary adjudication may be thought of as a useful procedural tool and an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten the free exercise of rights of speech and press."

The dissenting judge in the court of appeal correctly observed, 345 So.2d 948:

> "* * * the burden placed upon a plaintiff in defeating a motion for summary judgment [in a freedom of expression case] is a most severe and difficult challenge to meet, though not impossible. He cannot merely allege malice or reckless disregard, nor hope to prove malice by questioning the defendant or defendant's witnesses. Where in the ordinary type of case he could be successful in defeating the motion by only putting forth a minimum of evidence, here he confronts the guarantees of the First and Fourteenth Amendments, and thus stands the risk of the motion being successful if he cannot at this stage of the proceedings show that he can produce sufficient evidence on the trial that will prove with 'convincing clarity' the defendant's malice. Stated another way, I am convinced that the single thread that is woven throughout this entire fabric is that in order for plaintiff to be successful on the threshold issue of

summary judgment, he must come forth with strong evidence, convincingly clear evidence, that the defendant either know the statements published wre false or that he had reckless disregard of whether they were false or not. Otherwise, if plaintiff is allowed to escape summary judgment by simply a minimum showing, he has thus effectively invoked the 'chilling effect' of trial doctrine."

Decree

For the foregoing reasons, we reverse the judgment in favor of the plaintiff public official and against the defendant newspaper reporter and publisher, and we dismiss the plaintiff's suit for defamatory damages, at his cost.

REVERSED AND RENDERED.

X X X

SUPREME COURT OF LOUISIANA

NO. 59,988

HOWARD A. KIDDER

VERSUS

BOB ANDERSON AND
CAPITAL CITY PRESS, INCORPORATED

CALOGERO, Justice, (Dissenting)

I would affirm the judgment of the Court of Appeal which let stand a trial court defamation judgment while reducing it from $400,000 to $100,000. The Court of Appeal properly applied the law. They held plaintiff to the burden of proving "actual malice," New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), with "clear and convincing proof." Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974).

Accordingly, I dissent.

APPENDIX C

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 59,988

HOWARD A. KIDDER
Plaintiff-Appellee-Respondent

VS.

BOB ANDERSON AND CAPITAL CITY PRESS, INC.
Defendants-Appellants-Relators

APPLICATION FOR REHEARING OF HOWARD A. KIDDER

The petition of HOWARD A. KIDDER, plaintiff-appellee-respondent in the above entitled and numbered cause, respectfully represents that the decision of this Honorable Court rendered herein on the 30th day of January, 1978, reversing the judgment of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, and the Court of Appeal, First Circuit, and dismissing plaintiff's suit is erroneous and contrary to the law; that the same is prejudicial to the plaintiff as well as to all other public officials and/or public figures inasmuch as the decision grants a complete immunity to newspapers and others acting under First Amendment privileges; and, further, in that the decision of the majority is contrary to both the State and Federal jurisprudence, for the following reasons:

I.

The majority prefaced its consideration of the "motion for summary judgment" upon the premise that "since both parties request us to rule upon the issue" which is factually incorrect and totally unsubstantiated by the record.

Secondly, during oral argument on the original hearing

held herein on November 14, 1977, counsel for defendants-appellants-relators, devoted a majority of the time allotted for argument to the question of the summary judgment and when counsel (Robert L. Kleinpeter) attempted to respond to the argument of counsel for relators, counsel was instructed by the author of the majority opinion (Justice Albert Tate) that the problem of the summary judgment was no real concern and directed counsel to proceed to another issue. At that time counsel for respondent agreed with Justice Tate but also suggested that a poll be made of the entire Court to ascertain whether this conclusion was unanimous. As directed by Justice Tate and being in complete accord with his suggestion, counsel proceeded to another issue and terminated any further argument with reference to the two motions for partial summary judgment and was prejudiced by not fully arguing all the facts as well as the law applicable to the same.

Third, and last, the Court has placed an unreasonable burden upon a plaintiff in a defamation case involving a "public official" by its interpretation of the federal jurisprudence regulating summary judgments and in fact has so interpreted the federal jurisprudence to make it impossible for a "public official" or a "public figure" to ever obtain a jury trial (or, non-jury trial) against a news reporter or newspaper in the State of Louisiana if a motion for summary judgment is filed inasmuch as it will be impossible to shoulder the undue burden placed on the public official.

II.

The majority of the Court, in its written opinion, committed error in concluding that the relators, Anderson and Capital City Press, Inc., had no reason to doubt the trustworthiness of the information received by them and subsequently published, when relator, Capital City Press, Inc., had, on May 4, 1974, published an editorial of glowing unequivocal praise of Howard A. Kidder upon his appointment as Acting Chief of Police and although the publisher, Douglas Manship,

admonished Bob Anderson to proceed with caution prior to approving the investigation he subsequently undertook; and, also despite the admonition of Jim Hughes, Managing Editor of the newspaper, who likewise approved the investigation undertaken (subsequent to the editorial giving full approval of Howard A. Kidder) again reminding Bob Anderson **to proceed with caution**; and, in spite of Bob Anderson's admissions in the affidavits given in support of the **motions for partial summary judgment** to the effect that he knew the information given to him was based upon rumor or gossip. Additionally, after having accepted Howard A. Kidder's appointment as Acting Chief of Police (as a virtual "untouchable") and instructing Bob Anderson to proceed with caution, due to its admitted knowledge of the background and qualifications of Howard A. Kidder, Bob Anderson commenced his investigation and proceeded with the same being assisted and guided by two disgruntled policemen together with the assistance of the police union, all of whom were openly and admittedly dedicated to getting rid of Howard A. Kidder. With such assistance, Bob Anderson published articles setting forth certain rumors concerning Howard Kidder and in at least two of these articles, the author, Bob Anderson, openly stated that the individuals contacted denied making the statements attributed to them. Although Bob Anderson obtained some statements, most of which were "after the fact" statements allegedly notarized, these documents contained contradictory recitals and other grossly exaggerated statements which should cause a person proceeding "with caution" not to believe.

These facts pose a simple question: If Capital City Press, Inc.; its publisher (Douglas Manship); its Managing Editor (James Hughes); and, its reporter (Bob Anderson), accepted Howard A. Kidder as of May 4, 1974 (as expressed in its editorial supposedly reflecting its policy) as highly qualified with an unimpeachable background, how could they in good faith pursue an investigation, based on fifteen to twenty year old rumors, "with caution" and not doubt the trustworthiness

of the statements received? Bob Anderson was certainly fully aware of the attitude and design of his two accomplices (Childers and Spillers) as well as the police union. Further, most, if not all, of the other statements obtained by Anderson were with either Childers or Spillers present. When you consider the totality of the statements, the articles published and the motivating forces (Childers, Spillers and the police union), it should cause any individual to have reason to disbelieve Bob Anderson's self-serving declarations to the effect that he had no reason to question or doubt that which he admittedly knew originated as rumor or gossip.

III.

The majority, in its opinion, committed error, in concluding that the Court of Appeal, First Circuit, fell into error in affirming the verdict of an unanimous jury, concluding that the Appellate Court's reasoning "is that the credibility of the publisher's informants must be judged, not on the basis of an evaluation of sworn testimony at a trial (after full opportunity to rebut accusations), but rather on the basis of information available to the reporter at the time of the publication. St. Amant v. Thompson, cited above."

The majority, before reaching the above observation, discounted a statement attributed to Dr. William Moody, although this statement appears in the copy of the transcript purchased by respondent, and to counsel's knowledge, relators have not filed any motions to correct the record (except for alleged omission of jury instructions filed in the Court of Appeal, First Circuit) in keeping with the requirements of Article 2132 of the Louisiana Code of Civil Procedure, nor is the writer aware of any Court order, appellate or otherwise, directing that the testimony be changed as reflected; but, be that as it may, this statement was made by one of relators' informants and if made by James McBride, the jury had the benefit of his pretrial written statement as well as his sworn testimony, although limited due to illness. Regardless of to

whom this testimony is attributed, the record clearly reflects (R-1588 and 1589) that Dr. William Moody never knew Howard Kidder and further admitted that he had no knowledge that Howard Kidder was ever involved in prostitution. However, this testimony was preceded by an admission on the part of Dr. Moody that he talked to Bob Anderson only after being threatened with being involved in a conspiracy.

The majority next observed "That police officers were disgruntled and antagonistic to their proposed Chief is not necessarily an indication of their reliability as informants." If we concede this statement, arguendo, (which this writer will never be so naive or gullible to do) what proof is there in this record that Childers and Spillers (the two disgruntled officers) were ever informants for Capital City Press or Bob Anderson? The answer is simple: The record is totally barren of any evidence to indicate that they ever acted as informants for Capital City Press or Bob Anderson. The record will reflect that Anderson met Spillers and Childers after the commencement of Anderson's investigation and they met with others (as outlined by Officer Fred King who recanted and withdrew from the combine but only after informing Anderson, Spillers and Childers, et al that they had nothing but unconfirmed rumors) purportedly in a joint effort to get Kidder indicted. When they couldn't get evidence for an indictment, Anderson (as testified to by Fred King) stated he would keep Kidder's name on the front page as long as they could bring information to him.

As a practicing member of the bar with 28 years experience as a trial attorney, this writer poses a question as to whether this was the activity of informants or the concerted efforts of co-conspirators?

In further support of the reliability of disgruntled policemen as informants, the majority concludes "In fact, some of these very police officers now attacked as unreliable have often appeared as witnesses in criminal prosecutions by the

state with their credibility vouched for by officers of the state."

The record in this case will not support that observation with reference to any officer relied upon by relators and to the contrary, the absence of Charles Spillers as a witness, although listed by relators as a witness and present in the Courtroom, was most noticeable. If he was so credible, why didn't relators offer him as a witness? For a detailed discussion on the failure to call Charles Spillers, we direct the Court's attention to the discussion commencing at page 69 of respondent's original brief.

We submit that the error, assigned to the Court of Appeal, First Circuit, is totally unfounded and has no basis in fact or in law. The credibility of Dr. William Moody or the two disgruntled police officers is not pertinent to this assigned error.

Accepting the error assigned to the "intermediate majority's reasoning" as stated by the majority in the instant decision, we respectfully submit that a complete and thorough reevaluation by the majority of this entire case as it progressed through the Trial Court to the consideration by the intermediate Appellate Court should convince the majority in this instance that this assignment of error is totally without merit.

The intermediate Appellate Court, as well as this Court, has found no error in the instructions of the Trial Court as given to the jury, although relators have complained about the same. The Trial Court instructed the jury fully, at the commencement and upon the completion of the trial, due to the complex nature of the case and the involvement of the First Amendment. During the course of the trial, relators offered into evidence every statement obtained by Bob Anderson whether taken at the time of the interview or at a later date. These statements were admitted by the Trial Court, as the record reflects, in order for the jury to know what infor-

mation Bob Anderson had at the time he wrote and published the articles and to determine whether he published with doubt as to the truth of the publication.

In addition to the written statements, the jury heard and observed many witnesses, numbering approximately 60. The Court of Appeal, First Circuit, had the benefit of the written statements and in lengthy opinion, reviewed all the statements relied upon by relators.

Thus, the jury had the benefit of all statements available at the time the articles were published and was fully instructed as to the applicable law and further fully instructed by the Trial Court as to the purpose of admitting the written statements.

Consequently, the jury and the Court of Appeal, First Circuit, was furnished all information available to Anderson prior to publication and also had the benefit of observing and hearing some, but not all of these same individuals on the trial.

Thus, we submit that the majority committed error in concluding that the Court of Appeal, First Circuit, as well as the jury, based its conclusion on the evaluation of sworn testimony at the trial rather than on the basis of information available to the reporter at the time of publication. We, respectfully submit, that this conclusion of the majority is without merit and should be reconsidered and reversed.

IV.

The majority, in its opinion, finds no error with the unanimous verdict of a jury of twelve, properly instructed as to the applicable law, but after discounting the testimony of the appointing authority (the Mayor-President of Baton Rouge) the majority concludes that the published statements were defamatory and false but that plaintiff failed to establish by "clear and convincing evidence" that they were published with actual malice. In reaching this conclusion, the majority briefly touched upon the credibility of the testimony of the two disgruntled police officers; a statement supposedly erroneously attributed to Dr. William Moody; and the impropriety of giving any substance to the testimony of an appointing authority. This accounts for the testimony of only three witnesses (since Charles Spillers did not testify). This case was tried during the latter part of August and first part of September, 1975 and in addition to the three witnesses briefly discussed in the majority opinion, the jury heard and observed approximately 57 additional witnesses. With such an abundance of testimony, as well as the lapse of time and the number of statements submitted, this is a classic example of a case where the factual findings and conclusions of the trier of fact should not be disturbed except upon a finding of "manifest error."

The majority has determined that the unanimous verdict of a properly instructed jury should be reversed and we submit that in so doing error was committed according to both Federal as well as State guidelines.

WHEREFORE, petitioner prays that a rehearing be granted in this cause and that after due proceedings had the judgment rendered herein on the 30th day of January, 1978 be set aside and reversed and that there be judgment herein affirming the decision of the Court of Appeal, First Circuit, and for such additional relief as the law, equity and nature of the case may permit.

By Attorneys:

KLEINPETER & KLEINPETER

By: /s/Robert L. Kleinpeter

P. O. Box 66443
Baton Rouge, La. 70896
Attorneys for Howard A. Kidder

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

ROBERT L. KLEINPETER

who, being by me first duly sworn, did depose and say:

That he is the attorney for Howard A. Kidder, applicant in the above and foregoing petition; that he has served a copy of the above and foregoing application for rehearing on Mr. Frank W. Middleton, Jr., Attorney of record for Capital City Press, Inc. and Bob Anderson, by placing a copy of the same in the United States mail addressed to him at his address, P. O. Box 2471, Baton Rouge, Louisiana, postage prepaid.

Baton Rouge, Louisiana, this 8th day of February, 1978.

/s/ Robert L. Kleinpeter

Sworn to and subscribed
before me this 8th
day of February, 1978.

/s/Melanie Kleinpeter
Notary Public

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 59,988

HOWARD A. KIDDER
Plaintiff-Appellee-Respondent

VS.

BOB ANDERSON AND CAPITAL CITY PRESS, INC.
Defendants-Appellants-Relators

MEMORANDUM OF AUTHORITIES IN SUPPORT OF APPLICATION FOR REHEARING

MAY IT PLEASE THE COURT:

Counsel for respondent, Howard A. Kidder, respectfully requests the Court to again read the original brief filed on behalf of Howard A. Kidder in considering the application for rehearing. Additionally, we wish to supplement the original brief by a few brief references to the facts and authorities in an effort to substantiate the errors assigned to the majority opinion.

I.

As a preface to considering the motion for summary judgment, the majority commented "Additionally, **since both parties request** us to rule upon the issue, we find that the motion for summary judgment was improperly denied." (Emphasis supplied)

This statement of the Court is totally incorrect and in fact reflects upon the mentality of counsel for Howard A. Kidder inasmuch as we would have no reason whatsoever to request the Court to rule upon the issue. The record will reflect that an application for rehearing, as to quantum only,

was filed in the Court of Appeal, First Circuit, and that an application for a writ of review or certiorari was filed with the Supreme Court but that the same was denied with Justice Dennis dissenting. On application of Capital City Press, Inc. and Bob Anderson, relators, writs were granted and in keeping with the rules of Court counsel for Howard A. Kidder responded to the assignment of errors and argument advanced by opposing counsel and only argued that the decision of the Court of Appeal, First Circuit, should be affirmed. The only "request" made by counsel for Howard A. Kidder, as will appear by reference to page 78 of the original brief, was that the jury award should be reinstated to $400,000 as awarded by the jury. Other than this one request, counsel for Howard A. Kidder only responded to the arguments advanced by opposing counsel and in each instance gave detailed facts and reasons as to why the majority opinion of the Court of Appeal should be affirmed.

Secondly, during oral argument on November 14, 1977, counsel for relators devoted the better part of the time allotted for argument to the motion for summary judgment and counsel for Howard A. Kidder attempted to respond but argument was cut short, if not terminated, when Justice Albert Tate indicated that the question of a summary judgment, was at that point, no longer a matter of concern, if not moot, and suggested to counsel for Howard A. Kidder that we turn to other issues. We fully agreed that the motion for summary judgment was not a real issue but expressed our concern to the effect that we would like to know if that was the unanimous opinion of the entire Court. According to the written opinion, this apparently was not the unanimous opinion of the Court, inasmuch as the majority has concluded that "the motion for summary judgment was improperly denied."

In considering the summary judgment, the Court has overlooked the fact that counsel for relators filed not one motion for summary judgment but two "partial" motions for

summary judgment. Neither motion was all inclusive and the sustaining of one motion would not have made a trial unnecessary. In considering the partial motions for summary judgment, the Trial Court considered the pleadings, together with the attached publications, which were made a part of the petition, and these publications alone ran the gamut from glowing praise of Howard Kidder as being a man of unlimited qualifications and unimpeachable character with a sudden reversal whereby Howard Kidder was accused of accepting bribes, giving barroom protection and running houses of prostitution. At least one if not two of the publications themselves recited facts which reflected that the alleged author of the remarks denied making the same. Further, the Trial Court had numerous depositions as well as interrogatories and the answers thereto including affidavits of Howard Kidder, W. W. Dumas, Fred King and others which clearly put at issue the question of malice as well as the good faith of Bob Anderson in his investigation and publication of the articles published.

The majority sustains the motions for summary judgment by briefly referring to the case of *Mashburn v. Collin*, —— So.2d —— (which case is not available to counsel nor have we been able to obtain one through the Court of Appeal, First Circuit) and then adopted the observation of the dissenting Judge of the Court of Appeal, First Circuit at 345 So.2d 948. In the first instance, this writer is not aware of the contents of the *Mashburn* case inasmuch as we have not had the decision made available, however, we are aware of the facts involved in *Mashburn*, particularly as recited in the Court of Appeal decision. This writer, however, fails to see any similarity between the facts in *Mashburn* and the instant case. Additionally, the decision of Judge Lottinger, quoted by the majority, makes it abundantly clear that on a simple motion for summary judgment in a defamation case concerning a public official that the public official must come forth with strong evidence, convincingly clear evidence, that

the defendant either knew the statements published were false or that he had reckless disregard of whether they were false or not. In other words, Judge Lottinger held and this Court has adopted as the opinion of this Court, that on a motion for summary judgment a plaintiff (public official) must at that time prove with clear and convincing evidence the actual malice of the publisher. The Federal jurisprudence applicable to such situations is clearly set forth in the case of *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438, 441, as follows:

> "(4) However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. **We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party** (except, of course, when no contrary inference can legitimately be drawn), **but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among the legitimate inferences in such cases.**
>
> **The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that evidence is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the New York Times standard, the case is one for the jury, and it is error to**

> **grant a directed verdict, as the trial judge did in this case."** (Emphasis supplied)

Articles 966 and 967 of the Louisiana Code of Civil Procedure set forth the requirements and controlled the granting of a motion for summary judgment and is similar to Rule 56, F.R.C.P., and particularly sub-section (c) which provides "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'"

Guam clearly states that the standard against which the evidence must be examined is that of *New York Times* and its progeny but states further "But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." *Guam* thus holds that a plaintiff must be able to present material issues of fact with reference to "actual malice" under the *New York Times* standard and its progeny and there is no requirement under Rule 56(c), F.R.C.P., that a plaintiff, in response to a motion for summary judgment, at that time prove with clear and convincing evidence that actual malice in fact exists. However, if the pleadings, depositions and admissions on file together with the affidavits, if any, reflect that there is an issue of fatc as to actual malice then *Guam* holds that it is error to grant summary relief under such circumstances. In considering *New York Times* and its progeny, the majority opinion cited *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968) and as the Court probably knows, counsel for Howard A. Kidder was counsel of record for Herman A. Thompson in the *St. Amant* case. It is true that the U.S. Supreme Court reversed a favorable decision of the Louisiana Supreme Court; however, it should be noted that the Court in *St. Amant* redefined "actual malice" and, of course, there

was no opportunity to remand the case or submit additional facts in an effort to meet the new standard. Be that as it may, Judge Lottinger in his dissenting opinion, and the majority in the instant case, is apparently unaware of the language contained in *St. Amant* where the United States Supreme Court, after concluding that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication went further and stated that **even without affirmative evidence of probable falsity,** a reporter may be liable for publishing an account based on insufficiently—plausible evidence of veracity of what is uttered and concluded:

> "The defendant in a defamation action brought by a public official cannot, however, **automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.** The finder of facts must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous phone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would ever put them in circulation. **Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."** St. Amant v. Thompson at 732 (emphasis supplied)

Consequently, if you consider the contradictory statements contained in the articles published; the total acceptance of Howard A. Kidder in the editorial of May 4, 1974; the fact that Bob Anderson coerced Dr. William Moody into giving a statement involving Howard Kidder; the affidavit of Fred King who withdrew from the conspiracy after informing Bob Anderson and the others involved that the information obtained was nothing more than rumors or gossip; as well as

the other depositions, interrogatories and answers of record, there were actual facts in existence which, if proven, could substantiate a finding by the trier of fact that, viewing the evidence in a light most favorable to the plaintiff, could find actual malice and particularly under the guidelines as elaborated on in *St. Amant.*

It is significant to observe at this time that the majority devoted some time to discounting the testimony of Mayor-President W. W. Dumas, and apparently elected to completely ignore the fact that Mayor-President W. W. Dumas had advised the reporters including those from Capital City Press, Inc. that there was no truth in fact to the rumors about Howard A. Kidder. This again is in error inasmuch as *Guam* clearly states to the effect "it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party . . . but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases." (Emphasis supplied)

Accordingly, for the purpose of the motion for summary judgment, the Trial Judge and the Court of Appeal must not weigh the credibility of the evidence or draw inferences in favor of the moving party, when a motion for summary judgment is filed.

We reiterate, and with respect, that we fully disagree with Judge Lottinger's conclusions and the majority herein to the effect that it is necessary for a plaintiff, to be successful as a public official in a defamation case against a newspaper, to prove on a motion for summary judgment by clear and convincing evidence actual malice on the part of the defendant.

We submit that the Federal cases require only that the plaintiff set forth facts which would generate a triable issue

of fact as to defendants' actual malice. Then, upon the trial on the merits, it is necessary for the plaintiff to prove by clear and convincing evidence actual malice within the Federal rule.

II.

The majority, in commenting upon the merits of the case, concluded that "we find no reason to reject the jury's apparent finding that, despite these indications of impropriety (indications perhaps unavoidably arising from police association, in order to obtain information of law—violations, with persons on the fringes of crime), Chief Kidder was a reliable police officer throughout his career, with plausible explanations and denials for the various incidents of alleged impropriety involved." The conclusions of the jury not being rejected and the majority further concluding that the statements were defamatory and false, ws submit that the majority committed error and failed to follow the prevailing jurisprudence in the Federal Courts as well as the State Court. In *General Motors Corporation v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, at 1568, quoting from *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537, 71 S.Ct. 377, the United States Supreme Court observed:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

And this Court, in *Canter v. Koehring Company*, 283 So.2d 716, 724 (La. 1973) set forth the requirements with reference to appellate review as follows:

> "Where there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. Stated another way, **the reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.** The reason for this well settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." (Emphasis supplied)

We submit that there was more than substantial evidence for a Court or a jury to reach a conclusion favorable to the plaintiff as was done in this case. The jury was properly instructed as to all applicable law and jurisprudence at the commencement and at the close of the trial; and, relators have not made any effort to show "manifest error" or that there was a lack of "substantial evidence" but merely contend themselves with the argument that they are protected by the First Amendment.

We respectfully submit that the majority committed error in substituting its own evaluations and opinions for that of an unanimous jury properly instructed with all available statements and the testimony of approximately 60 witnesses made available to it and particularly in light of the controlling State and Federal jurisprudence.

III.

It is respectfully requested that the majority, as well as the other members of the Court, again reconsider the entire brief submitted on behalf of Howard A. Kidder on the original argument herein. Additionally, in view of the crippling effect

that this decision will have on unlimited numbers of public officials as well as public figures, we respectfully request that the Court reconsider the undue, if not impossible, burden which the Court has placed on a public official (plaintiff) if a motion for summary judgment is filed, as well as the role of the Appellate Court, under existing jurisprudence, on review.

Respectfully submitted,

KLEINPETER & KLEINPETER

By: Robert L. Kleinpeter

Robert L. Kleinpeter
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Baton Rouge, La. 70896
Attorney for Howard A. Kidder

APPENDIX D

SUPREME COURT OF LOUISIANA

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 2nd day of March, 1978, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS REFUSED:

61,519 K.C. So. Ry. v. City of Shreveport, et al
SUMMERS, J., would grant the rehearing.

60,525 State v. Earl J. Schmitt, Jr.

59,988 Howard Kidder v. Bob Anderson, et al
SUMMERS & CALOGERO, J.J., would grant a rehearing.

Statements Say Police Officials Protected Gambling, Barrooms

By BOB ANDERSON
Advocate Police Reporter

Acting police chief Howard Kidder and several other high police officials have a history of protecting some barrooms and gambling operations, according to statements from police officers and other informed sources.

Allegations of payoffs and gratuities are also contained in the statements.

Among the statements are notarized affidavits from two barroom employes who say they have witnessed Kidder receiving free liquor and signed statements from a number of police officers who say they have been stopped from making cases against certain barrooms.

Statements from other officers recount being told by gambling and barroom figures of payoffs and gifts they have given Kidder and other officers.

Copies for Probe

The Morning Advocate, with the consent of the persons who have given the statements, has turned the statements over to state Attorney General William Guste's office, which is currently investigating corruption and influence peddling in East Baton Rouge Parish.

Copies of the statements have also been given to U.S. Atty. Doug Gonzales.

District Attorney Ossie Brown recused himself from investigation of alleged wrongdoing by local officials in May when two police officers charged that Brown and Kidder had attempted to obstruct their investigation into such matters.

An affidavit from one barroom employe tells of Kidder coming into the lounge and accepting two cases of free liquor. In that affidavit the employe recounts being told by the owner that the man was Kidder and being instructed not to say anything about it to anyone.

That affidavit, supported by an affidavit from a second employe of the same establishment, recounts another incident in which Kidder and a young woman had several drinks with the owner, after which Kidder was presented with bottles of liquor, all without charge.

Most importantly, that incident occurred since Kidder has become chief, the employes say.

One of the employes states that the owner of the establishment has said they have nothing to worry about from the law because of their relationship with Kidder.

Figures Prominently

Another prominent figure in statements by police officers is Capt. Mario Vaccaro.

The officers claim they have been stopped while making cases against certain barrooms, transferred to "quiet zones," largely residential areas where there is little activity, after they made cases on the "wrong" barrooms, and that they have been told at roll call to lay off barrooms.

One of the officers tells of an incident in which Vaccaro halted the making of an after-hours liquor violations case after the officer had been told to go ahead by a detective unit.

The officer said he called for supervisor several times, after being sent on a complaint to the Terrace Street barroom, but received no response until a detective sergeant told him to make a case against the establishment and shut it down.

Vaccaro then came on the police radio, telling the sergeant, "take care of detective work and I'll handle the uniform calls!"

Asked at the scene whether he knew the owner of the establishment, Vaccaro said, "No, but we'll find him." the statement says.

Inside, however, Vaccaro immediately spotted the owner in a crowd, called him by first name, and said, "Damn it! I told you about this!" Vaccaro and the owner went into a side room, the captain coming out a few minutes later and telling the officers to leave without making an arrest or issuing a summons. the officer says.

Another signed affidavit statement names Lt. Col. Stanley Trigg as being the man who had him ordered not to patrol a particular street and not to investigate a barroom located on that street.

Patrol Noticed

The officer says he drove past the lounge in question about 15 minutes before closing time and was noticed by the owner of the lounge, who was standing outside.

A few minutes later he was called in by his supervisor, who told him that Trigg had called him and asked why a unit was checking that lounge. The supervisor then "advised me that Major Trigg had ordered him to keep his patrol units away from the . . .lounge," and for them not even to go on the street on which it was located, the statement says.

Questioned Friday about the case the supervisor said he had "no comment about it at this time."

Several other officers claim in written and oral statements that they have been stopped in the middle of making cases against lounge operators, when the operators called high police officials. One officer says that Vaccaro stopped him on several occasions from making a case against a particular lounge.

In statements more directly concerning Kidder, three officers say, and one has given a notarized affidavit, that they were told by the operator of one establishment, "It's going to cost me a lot more now that Kidder is chief. It cost me more when he went from major to colonel, and it's going to cost me more now, but it is worth it to me."

One sergeant's signed statement says that he was told by a lounge owner that he was paying $50 a week to Kidder and a sergeant to protect a gambling operation on E. Harrison Street.

Questioned three weeks ago about having made the statement the bar owner denied it and said he felt Kidder to be a "fine man." A bartender at the establishment is known to have called Kidder on at least one occasion when the owner was arrested for allowing juveniles in his lounge.

Another officer says that a suspect in a gambling investigation has admitted to him that he was once the "payoff man" to Kidder and Vaccaro in another gambling operation.

In other signed statements concerning Vaccaro, an officer says that while Vaccaro was in charge of a shift at Highland Road Precinct that the captain spent most of his duty time at a particular lounge — one of the lounges mentioned most often as being a "wrong" place to make a case.

Another officer tells in a signed statement of entering a back room of that bar and finding "approximately 15 or 20 black males sitting at various tables with money on the tables . . . either shooting dice or playing cards."

He said the owner came in and wanted to know what the officer and his partner were doing there. The officer said he was going to make arrests for gambling.

Ordered to Leave

The owner "told us that we had better leave", or he would call Capt. Vaccaro, the statement says. The bar owner also mentioned another police captain who is now retired.

The officer said that before they could make the arrests a sergeant arrived and advised them not to. As they were leaving Vaccaro arrived and told them, "Don't worry men, I'll take care of it."

A signed statement by another officer alleges that upon arriving at a Florida Street lounge to make a closing violation case, he was met at the door by Vaccaro.

The officer said that his supervisor asked Vaccaro what he was doing there at that hour of the morning and that Vaccaro said the owner was about to make a night deposit and had asked Vaccaro to accompany him to the bank.

Another officer present says there were still some 20 cars parked around the lounge, despite the fact that it was well past legal closing time.

That same lounge owner, who has moved to a new establishment, was named by a woman seeking help of detectives on June 20, after her husband allegedly lost $3,000 gambling in the lounge.

The woman told detectives she went to the lounge trying to get her husband to leave and that there were dice and a large amount of cash on the table. She said she threatened to call police and that the owner challenged her to do so, saying that he had the police "in the palm of his hand."

The lounge operator has only been arrested once for gambling and liquor violations, that in October of 1970 during a raid by the district attorney's office, sheriff's deputies and state police.

Vaccaro is also alleged, in two signed statements to have told officers regularly at roll call to leave barrooms alone, that closing and other liquor laws were not to be enforced by uniform officers, and according to one of the statements, that the only reason for the existence of laws on vice is because of "church people."

Reassigned

Patrolmen who "did make cases on bars for staying open past the legal time, or for allowing minors in lounges . . . would be assigned to a desk job or transferred to another shift, says one statement from an officer who was transferred from Vaccaro's command.

Other officers say that among the favorite spots to put men who continue to enforce the law is the Broadmoor Precinct on walking a beat.

Vaccaro and Trigg have both been moved to new positions since Kidder took office. Vaccaro is now one of the two captains in charge of the detective office, which Kidder has designated to have the responsibility of routine checks on barrooms.

Trigg has become Kidder's chief aide, working out of Kidder's office.

One source who has known Kidder since he first came to Baton Rouge has outlined a history of accepting of gratuities by the acting chief.

In a taped interview the source said the practice began small, with Kidder pulling up in front of a black barroom, waiting until the presence of his patrol car freightened away patrons, the source says.

When the operator of the bar would come out, it was Kidder's practice to ask whether the operator had any Chesterfield cigarettes and then to add, "How about getting me a carton?" according to the source.

"I don't owe you anything, do I?" Kidder would then say, the source recounted.

The source said he accompanied Kidder on some of his trips and was once sent by Kidder to get free cases of liquor.

One local liquor and produce wholesale operation used to leave a box of goods at Kidder's home every Saturday morning, the source recalls.

Kidder Rental Houses Got Cut in Assessment

By BILL McMAHON

The parish tax assessor's office has reduced the assessed valuation — and the taxes — on two rental-type houses owned by acting Police Chief Howard A. Kidder.

The tax assessor reduced the evaluation of a house on Ovid Street from $2,350 to $1,350, dropping the taxes from $130.54 to $67.64.

The valuation of a duplex on Hearthstone was dropped from $3,300 to $2,300, bringing taxes down from $186.62 to $115.92.

Records in the assessor's office show that houses on the same streets as the Kidder-owned properties are assessed for greater amounts. Those adjacent properties' assessed valuations have not been lowered, a spot check shows.

The acting police chief owns two other groups of property in the parish, his home and three connected commercial lots, clerk of court records show.

He pays $548.69 in monthly mortgage notes, records show.

He bought his home in 1958 and the other properties in 1965, 1966 and 1969, conveyance records show. Kidder's present salary is $25,200 a year, but in 1968, when he was a major, it was $11,200.

His salary was increased to $15,600 by 1973, and was $18,800 in March of this year when he was a lieutenant colonel and before he became acting police chief.

Cut Explanation

Asked how the reduction in the assessed value of the two rental-type properties came about, deputy assessor Frank Granger said, "I would think because of a reinspection of the property and the decrease in evaluation."

"There's a lot of areas where the properties could be dropped in assessed valuation," he said.

Asked whether it was a common practice to do that, Granger said, "Well, if people come in and ask. If they figure the taxes are too high, sure, you could do it, I could do it, anybody in this city could do it."

Granger said reduction of assessed valuation is a "fairly common practice" in those areas "where homes are getting older and older and older, and probably the assessed valuation was placed on them . . . maybe 30 or 40 years ago."

A check of homes on Hearthstone near the Kidder duplex revealed the lowest assessed evaluation is $4,500 and the highest $6,400, compared to the evaluation of $2,300 on the duplex.

On Ovid Street, nearby houses are assessed from $2,100 to $5,050, compared to the $1,350 on the Kidder single-family residence.

Records Cited

Clerk of court records show Kidder bought the Hearthstone duplex in 1965. It carried a $10,800 mortgage. Assessor's records say the cost was $14,500.

The Ovid Street property was bought in 1966 for $8,500, records show, with $600 paid in cash and $7,900 financed.

Kidder pays monthly notes of $87 and $65, respectively, on the two pieces of property.

Most recently, in 1969, Kidder bought three commercial lots behind Bon Marche Shopping Center, on North Carrollton Avenue.

He paid $5,000 in cash and mortgaged $25,000. A year later the $25,000 mortgage was canceled and another mortgage of $26,000 at nine per cent interest was negotiated.

Records show his investment to be $31,000 in the three lots, with monthly payments of $234.

The three lots are assessed at $800 each.

Adjoining Lots

Adjoining commercial lots for sale by the C. J. Brown real estate firm are listed at $9,375, a price less than Kidder's investment.

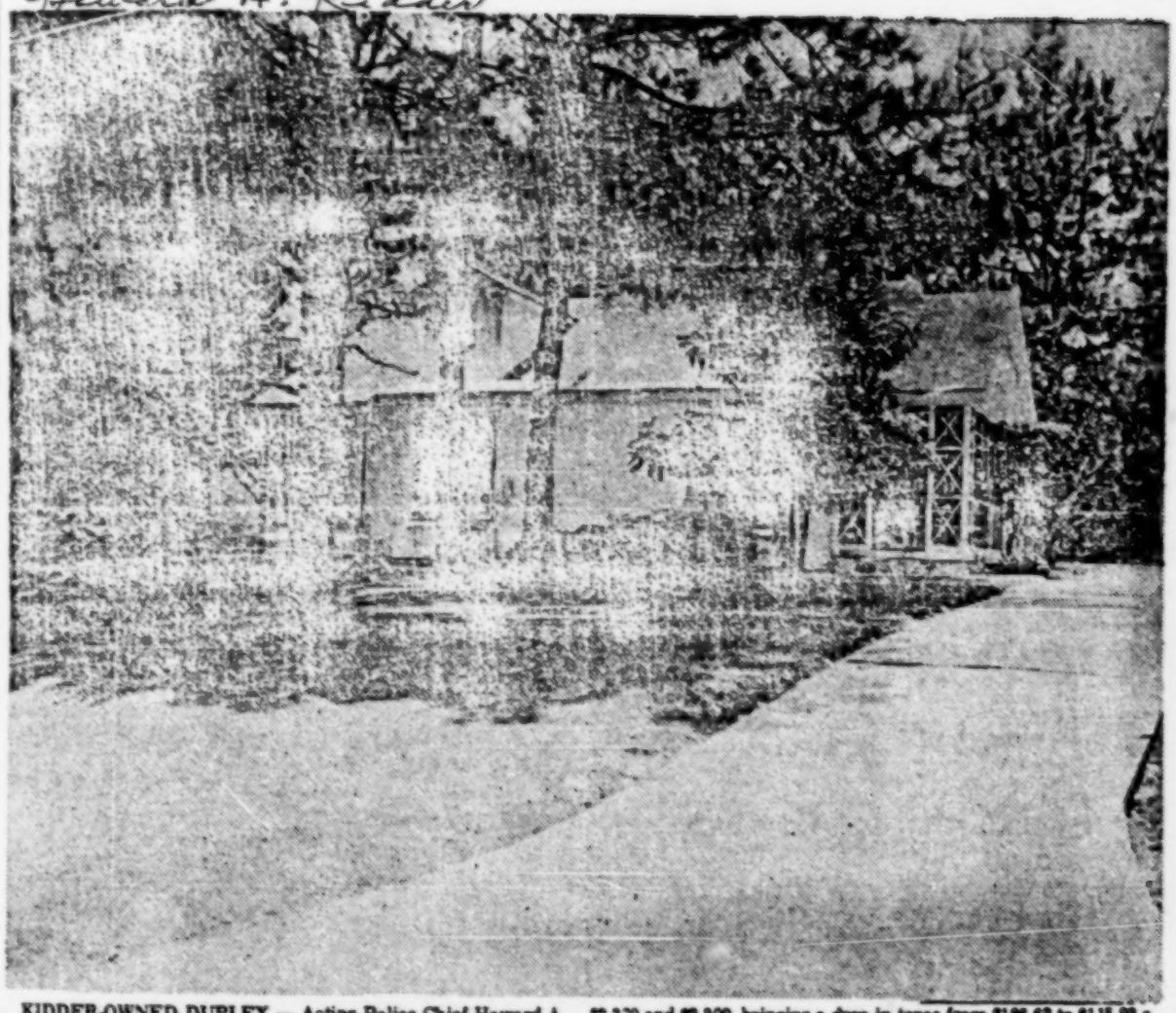
Kidder's home is valued by the tax assessor at $4,200. He paid $33.60 in taxes on that property last year.

Although substantial improvements have been made to the property, assessor records show no changes in the assessed valuation.

The police chief's home, at 3153 Gladden, was bought in 1958 with a $14,200 mortgage, which was canceled in 1963. At the time of the cancellation, a new mortgage of $17,000 was entered into.

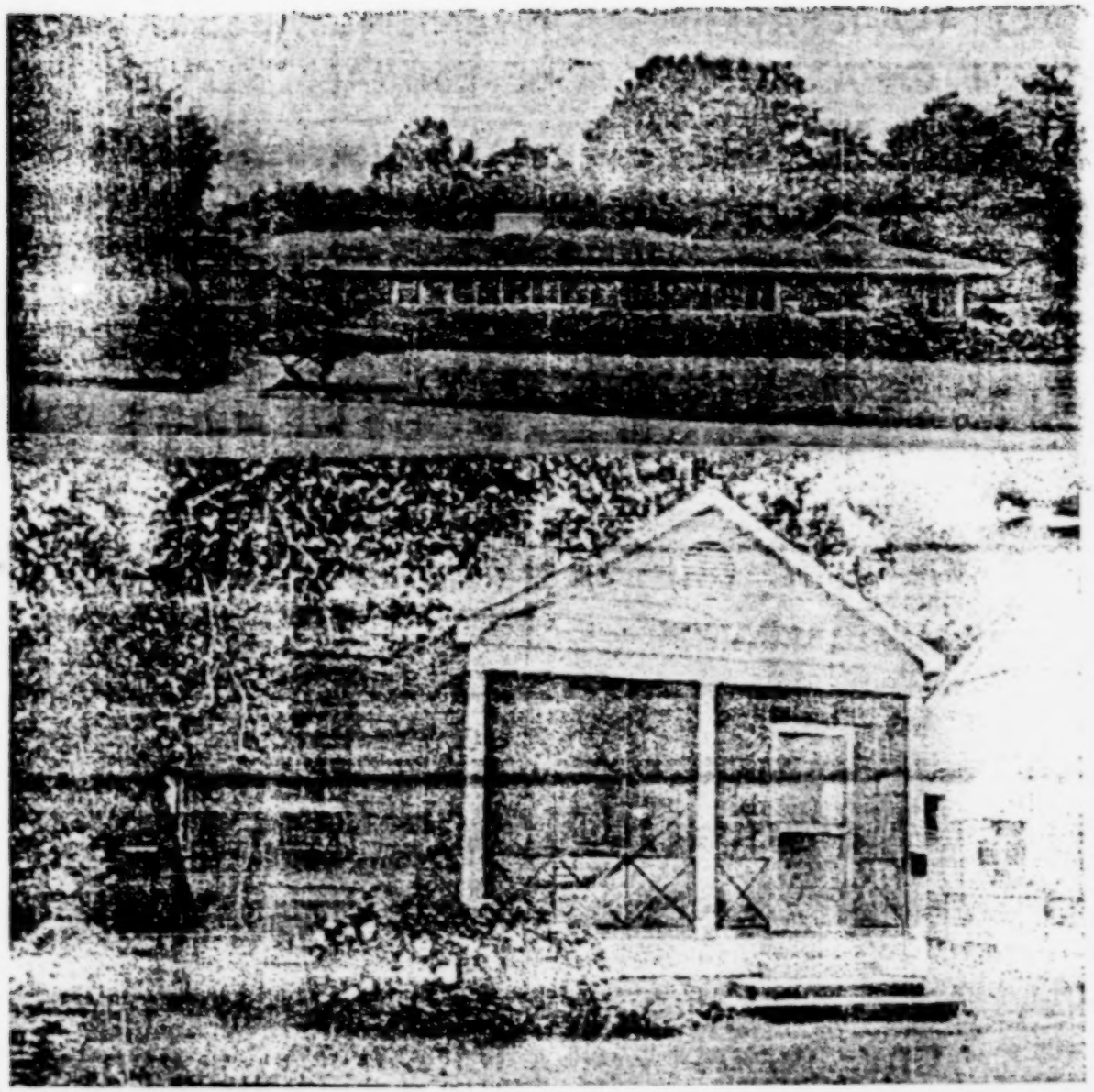
The mortgage included 240 payments at $162.69 a month at 5½ per cent interest, payable to the Equitable Life Assurance Society of the U.S.

Howard A. Kidder



KIDDER-OWNED DUPLEX — Acting Police Chief Howard A. Kidder owns this property in the 1400 block of Hearthstone, which had its assessed valuation reduced by the tax assessor's office from $3,300 and $2,300, bringing a drop in taxes from $186.62 to $115.92 a year.

— Staff photo by R. Duane Cooke



POLICEMAN'S PROPERTY — Acting Police Chief Howard A. Kidder owns several pieces of property in Baton Rouge, among them his home, at top, assessed at $4,200 by the parish tax assessor, and a rental-type house, below, which had its assessment reduced from $2,350 to $1,350. Kidder's home is located on Gladden Street the rent house, on Ovid Street.

— Advocate staff photos by R. Duane Cook

MA JUL 17 '74

Harassment Is Claimed By Officer

Howard Kidder

By BOB ANDERSON
Advocate Police Reporter

"I guess you know now what we do with people who have diarrhea of the mouth," city policeman Bruce Childers quoted one sergeant as saying to him as he began his first day of walking a beat on Riverside Mall Tuesday.

Childers, an experienced intelligence officer, says he feels he was transferred to the beat from the Intelligence Division as harassment because of an investigation he was doing on public officials under Police Chief Rudolph Ratcliff and because of statements he has given the press.

Childers was ordered to do nothing but answer the phone in the Intelligence office when Kidder first became chief, and his partner in the investigation, Charles Spillers, was transferred to Broadmoor Precinct.

Spillers resigned from the force to continue the investigation and Childers has continued to assist on his own time.

Childers described his first day on the beat as being one of general harassment from some superiors and said he felt it was an attempt to force him into resigning.

Childers said he and many other rank and file officers were disappointed by Mayor-President Dumas' position that he would keep Kidder up to the point of an indictment.

The young officer said that if allegations such as the ones made against Kidder and two other police officials had been made against officers of a lower rank that the men would have been suspended until an investigation was made.

In a Sunday story the Morning Advocate quoted signed statements from a number of officers alleging wrongdoing by Kidder and the other officials in connection with enforcement of laws on some local barrooms and gambling operations.

The story also quoted officers as saying that assignment to Broadmoor Precinct or to walking a beat were punishments normally given officers who failed to comply with illegal orders from their superiors.

Kidder has denied the allegations and has said that all of the recent transfers were made at the request of the division commanders.

ST. JUL 17 '74

Officer Says Job Change Harassment

Policeman Bruce Childers, one of the officers involved in the controversy over the appointment of Acting Police Chief Howard Kidder, said yesterday that he considers his transfer to a walking beat on Riverside Mall harassment.

He described his first day on the beat as one of general harassment from some supervisors and as an attempt to force him to resign from the force. Childers was transferred to the beat from the department's intelligence division.

Childers and Officer Charles Spillers came into conflict with Kidder as soon as the new acting chief was appointed.

Spillers was transferred from special investigations to the Broadmoor Precinct, while Childers said he was ordered to do nothing in the intelligence office but answer the phone.

They said they saw the moves as an effort to thwart an investigation of public officials they were conducting.

Kidder said Spillers was transferred because he was no longer useful as a narcotics undercover agent because his "cover had been blown."

Kidder denied Childers had been told to do nothing but answer the phone.

Spillers resigned from the force to continue the investigation. Childers has continued to assist on his own time.

Kidder last week announced the first step in a reorganization of the department, making 34 personnel transfers.

He noted that Childers would be one of those transferred to the patrol division. The acting chief said all the transfers were recommended by department heads.

The particular job Childers would get in the patrol division would be up to the commander of that division, Kidder said.

"I guess you know now what we do with people who have diarrhea of the mouth," Childers said a sergeant told him yesterday as he began his first day on his downtown beat.

Childers said he and many other officers were disappointed by Mayor-President Doiron's announcement that he would keep Kidder, even up to the point of indictment.

He referred to an article reporting allegations against Kidder and two other police officials in connection with protection of certain bars and gambling operations.

If such allegations had been made against an ordinary officer, he would be suspended until an investigation was made, Childers said.

MORNING ADVOCATE, Baton Rouge, Thurs., Aug. 8, 1974

Kidder Reported Once Involved In Prostitution

By BOB ANDERSON
Advocate Police Reporter

A local physician has told the Morning Advocate that acting police chief Howard Kidder, Capt. Mario Vaccaro and another police officer, who is now retired, operated a house of prostitution in Baton Rouge in the late 1950s.

The doctor said he made weekly checks of the prostitutes.

Initial arrangements for his services were allegedly made by Vaccaro and the other officer.

He said he was told by the girls that they were working for those two officers and Kidder. He would make no further mention of Kidder to the press, speaking of fear of "harassment and intimidation."

Two other investigators who talked to the doctor said he also told them of conversations with Kidder about the prostitutes.

Officer's Statement

The Morning Advocate has also received a signed statement from a police officer recounting a conversation in which he says Vaccaro told him, and several other police officers, that Vaccaro and Kidder once ran a house of prostitution.

"You know, Kidder and I used to run a whorehouse together on Julia Street," the officer quotes Vaccaro as saying.

The officer said the statement was made shortly after Kidder became acting chief and moved Vaccaro to a joint command of the detective office.

"Vaccaro then added something like, 'But times have changed. You can't do that anymore.' I am not sure of these exact words on the latter statement, but the first quotation is exact, word for word," the officer's statement says.

The doctor said he treated the five girls in his office on Saturday afternoons when he had no regular patients. He said he saw them every week and gave them blood tests once a month. Each girl paid him $5 a visit, he said.

He said the officers told him they were sending the girls to New Orleans before they contracted with him.

'Accidental' Raid

The house closed after other officers "accidentally" raided it several months after he began checking the girls, the doctor said. He said some of sort "show" was being put on in the house when it was raided and that at least two important persons were present.

The doctor said he knew nothing about reports that the house reopened later and that another local doctor had been contracted to care for the prostitutes.

The doctor said he has already given information to representatives of the attorney general's office and that he has been told he will probably have to appear before a grand jury.

One retired police sergeant said it was common knowledge among police officers that Kidder and Vaccaro were running a house of prostitution and that he raided a house which he believes to have been operated by those officers.

The officer said he was transferred the day after he made the case. The address which he gave as being the location was on the corner of Julia Street.

The doctor said he checked with a board member of the parish medical society before he agreed to check the prostitutes, and that the board member outlined a procedure under which it would be ethically proper for him to make the examinations.

He said he would have come forward with the information sooner but that he was afraid of retaliation.

When first approached by the Morning Advocate several weeks ago, the physician declined to grant an interview, saying of Kidder, "I've got something on him that could crucify him but it would involve me."

'Swift' Retaliation

He went on to say, "His retaliation would be very swift."

Kidder, who has been on the force since 1949, was appointed acting chief of police in April when Chief Rudolph Ratcliff went on medical leave, after which Ratcliff was reportedly to leave the force to prepare for next year's Livingston Parish sheriff's election.

Kidder immediately became a center of controversy over the alleged supression of an investigation of several local politicians, the controversy growing when he went to the scene of an incident where a local entrepreneur was in trouble with the police at 3 a.m.

The controversy has since broadened with television stories alleging that Kidder wrote specifications suited to a particular company for new city police uniforms, and that the uniforms were inferior, and that Kidder failed a background check for the FBI academy because the inquiry allegedly turned up associations between Kidder and known criminals.

Most recently a Morning Advocate story cited signed statements that Kidder, Vaccaro and some other police officials had protected certain barrooms and gambling operations.

Statements in that connection were turned over to the state attorney general's office which is investigating corruption and influence peddling in East Baton Rouge Parish. Copies of the statements have also been given to U. S. Attorney Douglas Gonzales.

STATE-TIMES, Baton Rouge, La., Thurs., Aug. 8, 1974

Man in Vice Scandal Reportedly Was Brothel Operator

Acting Police Chief Howard Kidder, Capt. Mario Vaccaro and a now retired police officer operated a house of prostitution in the late 1960's, a local physician has said.

The physician said he gave the prostitutes weekly medical examinations.

Initial arrangements for his services were allegedly made by Vaccaro and the other officer.

He said he was told by the girls that they were working for those two officers and Kidder. He would make no further mention of Kidder to the press, speaking of fear of "harassment and intimidation."

Two other investigators who talked to the doctor said he also told them of conversations with Kidder about the prostitutes.

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Statements in that connection were turned over to the state attorney general's office which is investigating corruption and influence peddling in East Baton Rouge Parish. Copies of the statements have also been given to U. S. Attorney Douglas Gonzales.

MA 6-12-74

BR Police Uniforms Criticized

Knit uniforms, such as the ones recently purchased by Baton Rouge City Police, are inferior and wear poorly, a local television station quoted several manufacturers as saying Tuesday.

WBRZ also said it had learned that the specifications for the uniforms were written by acting police chief Howard Kidder, while he was still in charge of the services division for city police, with help from a representative of Martin's Uniform Co. in Jefferson Parish.

Martin's Uniform Co. later was awarded the contract.

The firm was one of only two companies to bid on the uniforms. The second company, the Donald S. Lavigne Co., is a contractor for Martin.

Martin got the contract for some $182,000, after Lavigne's bid was thrown out on a technical violation when they did not enclose a bonding check with their bid.

Matched Uniforms

The station quoted a local manager for Martin, Ron Weisman, as saying that the specifications were written to match the Martin uniform, but said that he doesn't feel that the way in which the specifications were written stopped anyone else from bidding on the uniforms.

A check of the 33 companies which asked for specifications from the city revealed, however, that only Martin and its contractor deal in knit uniforms.

WBRZ said the Martin spokesman conceded that it would not be economical for other companies to bid on the Baton Rouge project since they are not tooled for knit production. He conceded also that knit uniforms are inferior, WBRZ reported.

Checking further into the problems of knit uniforms the station said it was told by one manufacturer that the knits would not hold under the work of a policeman.

Wear Discussed

Another said that tests showed the knits burned easily, snagged easily and predicted that the seats of the trousers would start to wear after six months use by a patrolman who has to get in and out of a patrol car often.

A third clothing company spokesman said the knits are cheaper to purchase initially, but that the cost of replacement normally outweighs any savings, the station said.

A state police spokesman was quoted as saying that state police had recently rejected knits because they would not hold up.

The station said a Martin representative said Kidder selected the knits in hope of creating a new image for the police department.

2-A MORNING ADVOCATE, Baton Rouge, Thurs., Aug. 8,

Editorial

Mayor's Insistence Just Doesn't Hold

Howard Kidder

The time has come for Mayor Woody Dumas to abandon his unreasoning insistence that Howard Kidder, now acting police chief, be named to that important post permanently.

The Morning Advocate today has published another in a series of serious allegations against Acting Chief Kidder. The allegation is that Kidder and two other officers operated a house of prostitution in the late 1950's and possibly longer. This is a serious charge and this newspaper would not and does not make it lightly. The charge is serious enough and well-founded enough to warrant public knowedge and consideration.

This allegation together with others made in the recent past concerning Kidder's conduct as a police officer make it imperative that Kidder no longer be considered for the post of chief of police. The other charges referred to include taking payoffs for protecting certain bar owners from the law. The charges come from trustworthy members of the police department and from witnesses outside the department.

The job of police chief of a city this size is a demanding one. It calls for fairness and courage. Most of all it calls for a man whose conduct is without blemish.

Mayor Dumas' earlier contention that any man is innocent until proven guilty does not really apply here. Any man who is police chief of a community should be one without taint or the hint of it. Such men are available.

The dedicated officers serving within the police department deserve leadership which will support them and in which they can take pride. Kidder cannot provide such leadership.

It is time for the people of Baton Rouge to demand that their mayor explain why he insists upon naming Howard Kidder to a job for which he is clearly not suited. It is time for Mayor Dumas to act in the public interest.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1714

HOWARD A. KIDDER,

Petitioner,

versus

BOB ANDERSON AND
CAPITAL CITY PRESS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

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STATEMENT OF THE CASE

This is a libel action by Howard A. Kidder against Capital City Press, Inc., and its reporter, Bob Anderson, arising out of a series of newspaper articles and an editorial appearing

in the Morning Advocate and State-Times newspapers from June 12, 1974 through August 8, 1974. Copies of these articles and editorials have been reproduced in Appendix E of the petition for a Writ of Certiorari at pps. 116 et seq.

Generally speaking, the statements of fact contained in these newspaper articles were based on public records and upon signed statements of witnesses, most of which were obtained prior to publication of the articles in question.

See *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978) at p. 1309 in which the Louisiana Supreme Court found as follows with regard to these articles:

> "In each instance, the published statements were based upon interviews, generally corroborated by written statements taken at the time, with individuals in an apparent position to know of the factual accuracy of the information conveyed.
>
> "The record discloses no reason for Anderson or his publisher to doubt the trustworthiness of the information received by them and subsequently published."

The petition for Writ of Certiorari does not dispute this finding.

Prior to trial, defendants filed two motions for partial summary judgment. The first of these motions related to the article entitled, "Statements Say Police Officer Protected Gambling, Barrooms." The second motion for partial summary judgment related to the remaining articles of which petitioner complained.

The trial court denied both of these motions for partial summary judgment. The jury returned a general verdict for the petitioner and found damages in the amount of $400,000.

The majority opinion of the Louisiana Court of Appeal for the First Circuit affirmed the judgment for the plaintiff, but reduced the award of damages to $100,000. One judge dissented on the ground that the motions for partial summary judgment should have been granted because the petitioner did not produce any evidence in opposition to said motions showing "malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed2d 686, 84 S.Ct. 710 (1964) and its sequelae. See *Kidder v. Anderson*, 345 So.2d 922 (La. App. 1977).

The Louisiana Supreme Court reversed on the ground that there was no evidence of "malice" sufficient to sustain a jury verdict.

It is from this decision that the plaintiff is seeking a Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. There is no evidence in the record, nor before this court, which could possibly sustain a finding of *New York Times* actual malice.

In *New York Times v. Sullivan*, 376 U.S. 254, 284, 285, 11 L.Ed2d 686, 709, 710 (1964), this court overturned an Alabama jury verdict on the ground that the evidence before that jury could not constitutionally sustain a verdict for the plaintiff, as follows:

> "Since respondent may seek a new trial, we deem that

considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 347 US 513, 525, 2 L.Ed2d 1460, 1472, 78 S.Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp v. Florida*, 328 US 331, 335, 90 L.Ed 1295, 1297, 66 S.Ct. 1029; see also *One, Inc. v. Oleson*, 355, U.S. 371, 2 L.Ed2d 352, 78 S.Ct. 364; *Sunshine Book Co. v. Summerfield*, 355 US 372, 2 L.Ed2d 352, 78 S.Ct. 365. We must 'make an independent examination of the whole record.' *Edwards v. South Carolina*, 372 US 229, 235, 9 L.Ed2d 697, 702, 83 S.Ct. 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

"Applying these standards, we consider that the **proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands**, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law."

The Louisiana Supreme Court has followed the same procedure in reversing the jury verdict in this case. Thus, it is

encumbent upon the petitioner in this case, as it has been throughout this litigation, to present evidence of *New York Times* actual malice, i.e., that Capital City Press and its reporter, Bob Anderson, actually knew that one or more facts reported were false at the time of publication or that they entertained serious doubt as to the truth of any fact reported.

The petitioner has presented no such evidence throughout this litigation, nor is any such evidence contained in the petition, although the petitioner is free under Rule 21 of the Supreme Court Rules to request certification of any part of the record and evidence which could be construed as showing *New York Times* actual malice.

Rather than presenting any evidence relating to the specific facts reported in the newspaper articles in question and any evidence relating to the surrounding circumstances at the time of publication, the petitioner has relied on general statements of malice in the traditional sense, i.e., that defendants and others were "out to get" Howard Kidder and to prevent him from being named as permanent Chief of Police for the City of Baton Rouge.[1] To buttress so-called evidence of malice, the inflammatory word "conspiracy" is repeatedly used by petitioner.

The Louisiana Supreme Court dealt with this argument in the following language:

"That police officers were disgruntled and antagonistic

1. Unquestionably, many of the persons who gave statements to Bob Anderson were "out to get" Howard Kidder, in the sense that they did not believe him qualified to be Chief of Police. However, the obvious reason for the hostility of these persons was their knowledge of Howard Kidder, as contained in those statements, rather than any unspecified and unreasoning Machiavellian hatred.

to their proposed chief is not necessarily an indication of their unreliability as informants. In fact, some of these very police officers now attacked as unreliable have often appeared as witnesses in criminal prosecutions by the state, with their credibility vouched for by officers of the state . . .

"With regard to the reliability of the information conveyed by these police officers, the criterion is not whether they were motivated by selfish reasons to furnish the derogatory information. Rather, it is whether or not they were in a position to obtain the information furnished by them, and whether or not the report they conveyed was so inherently improbable as to create indisputable doubt as to its authenticity." 354 So.2d 1306, 1309.

Next, petitioner complains that some persons who gave statements were gamblers and bar maids and that persons of this kind are so well known to be untruthful in every respect that their occupations alone give rise to a knowledge of falsity.[2]

Here again, the Louisiana Supreme Court disposed of this contention by holding:

"We are unable to accept the inference that, therefore, the reporter should not have relied upon information as to bribery conveyed by them. Just as the state is rarely in a position to rely upon the testimony of church wardens and Sunday-school teachers to prove criminally corrupt activities of public officials, so newspaper investigation of reports of corruption must often obtain first-

2. A reading of the "Prostitution" article (Petition p 128) reveals that the informants were a medical doctor and two police officers. The "Barroom" article (Petition p 116) refers to statements about Kidder by two employees of bars, two alleged gamblers, police officers, and Kidder's brother-in-law, Jim McBride.

hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations." 354 So.2d 1306, 1309.

What is totally lacking in this case, and in the petition for certiorari, is any evidence of any circumstance, other than occupation, known to Bob Anderson prior to publication about these persons whose statements were relied on, which would possibly give rise to a knowledge of falsity, or serious doubt as to truth of the contents of these statements.

Petitioner's overly broad generalizations that *New York Times* actual malice existed, must not be given any weight, in the absence of any evidence in the record or before this Court which would support a jury finding of actual malice as to any fact reported.

Similarly, as the Louisiana Supreme Court found, the petitioner failed to present any evidence in opposition to the motions for partial summary judgment of *New York Times* actual malice with respect to any fact reported. 345 So.2d at p. 1310.

II. Petitioner also claims, for the first time, that his rights to a jury under the Seventh Amendment of the United States Constitution as incorporated into the Fourteenth Amendment, were violated.[3] The predicate for this claim must be some evidence which could sustain a Seventh Amendment jury finding of *New York Times* actual malice. In fact, *New*

3. This Court has previously held that it will not decide constitutional issues raised before it for the first time. 28 U.S.C.A. 1257; Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed2d 398, 89 S.Ct. 1162 (1969); see also this Court's Rule 23(1)(f), which is not observed in petitioner's application filed in this case.

York Times is strikingly similar to the present case in that it involves a State Court jury verdict in favor of a local official against the publisher. This Court did not find itself inhibited in reversing such a jury verdict when the constitutionally required evidence of "malice" by "clear and convincing evidence" was not found in the record of the case.

Here the Louisiana Supreme Court, after a review of the evidence, specifically found:

> "The **record discloses no reason** for Anderson or his publisher **to doubt the trustworthiness of the information received** by them and subsequently published." 354 So.2d 1306, 1309 [Emphasis Added]

In view of the factual finding by the State Court of **no** evidence to support a finding of "malice," even the "common law" rule of the Seventh Amendment would not prevent reversal of a jury verdict which has no evidence of record to support it. This case does not, therefore, present an instance of a differing result under "the common law" rule as to jury verdicts, with that reached by the Supreme Court of Louisiana.

It should also be noted that the Louisiana Supreme Court held that defendants' motions for summary judgment were improperly denied (see 354 So.2d 1306, 1310). Clearly, therefore, this case should never have reached the trial stage nor have been submitted to the jury in the first instance. Therefore, what the jury may or may not have found based on the evidence presented at trial need not be considered or examined in order to support the correctness of the judgment rendered by the Louisiana Supreme Court.

For all of the foregoing reasons, the instant case simply is not one in which there has been heretofore, nor is now in question, any alleged conflict between Louisiana appellate procedure and petitioner's alleged rights under the Seventh Amendment.

CONCLUSION

The Louisiana Supreme Court has applied the same standards of review as set forth by this Court in *New York Times v. Sullivan*, cited supra, and has reached the same result for the same reasons. This petition for a writ of certiorari should be denied.

Respectfully submitted,

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Baton Rouge, Louisiana 70821
(504) 387-3221

Attorney for Respondents

CERTIFICATE

I, of counsel for defendants, Bob Anderson and Capital City Press, Inc., do hereby certify that three (3) copies of the above and foregoing brief in opposition to petition for certiorari have been mailed this day, postage prepaid, to Mr. Robert L. Kleinpeter, P. O. Box 66443, Baton Rouge, Louisiana 70896.

Baton Rouge, Louisiana, this _____ day of June, 1978.

F. W. Middleton, Jr.